

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

EDDYSTONE RAIL COMPANY,	:	CIVIL NO. 17-495
LLC,	:	
Plaintiff	:	
	:	
v.	:	
	:	
	:	
BRIDGER LOGISTICS, LLC,	:	Philadelphia, Pennsylvania
et al,	:	February 25, 2020
Defendant	:	1:46 p.m.

- - -

TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE JAN E. DUBOIS
UNITED STATES DISTRICT JUDGE

- - -

APPEARANCES:

For the Plaintiff:	FILIBERTO AGUSTI, ESQUIRE Steptoe & Johnson, LLP 1330 Connecticut Avenue NW Washington, DC 20036
For the Defendant:	LAWRENCE G. SCARBOROUGH, ESQUIRE
Bridger Logistics,	JACOB A. KRAMER, ESQUIRE
LLC	Bryan Cave Leighton Paisner, LLP 1290 Avenue of the Americas New York, NY 10104
For the Defendant:	JEREMY FIELDING, ESQUIRE
Julio Rios	JONATHAN D. KELLEY, ESQUIRE
Jeremy Gamboa	Lynn Pinker Cox & Hurst, LLP 2100 Ross Avenue Suite 2700 Dallas, TX 75201

1 Audio Operator: Michael Cosgrove

2 Transcribed By: Michael T. Keating

3 - - -

4 Proceedings recorded by electronic sound
5 recording; transcript produced by computer-aided
6 transcription service.

7 - - -

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (The following was heard in open court at
2 1:46 p.m.)

3 THE COURT: -- Logistics, LLC and a number
4 of others, many others, civil action number 17-495.
5 We scheduled a status conference for today. I assume
6 you're all ready for it. I won't ask you to sound
7 off one by one.

8 We all miss Judge Kelly. I miss him more
9 now than I did before this file was transferred to
10 me. This is not exactly the type of case a judge
11 dreams about getting in mid-cycle. I note that there
12 were over 300 docket entries, and there's a lot of
13 love between the two sides in the case. And my goal
14 today is to try to streamline it and to try to cut
15 through a lot of the what I perceive to be litigation
16 tactics -- I suspect litigation tactics because
17 judging -- or recalling what I did when I was
18 practicing, I did a lot of what you're doing in this
19 case. And it makes a lot of work for the Judge, and
20 I'm going to try to avoid that.

21 I've got a full calendar, and just tail-
22 ending two MDLs, and I have another one that's very
23 active. So I'm not looking for a lot of paper, and
24 I'm particularly not looking for a lot of in-camera
25 reviews of hundreds of documents or more. So I want

1 you to be thinking about the way we can accomplish
2 that goal.

3 First of all, there are two pending
4 motions, and I'll talk about them. Thank you. And I
5 think the discovery motion might take a little more
6 time than the motion to dismiss. And we'll adopt a
7 schedule, and I'll hear what you have to say.

8 I administer cases like this largely by
9 telephone. I decided it was appropriate on this
10 occasion, the first time we will be getting together,
11 to have everyone in the courtroom. As I look around,
12 I think I recognize all of two of you, and there are
13 more than a dozen in the courtroom. And at least I
14 think I recognize two of you. Henry Hockheimer?

15 MR. HOCKHEIMER: Good afternoon, Your
16 Honor. Nice to see you again.

17 THE COURT: Good to see you again. You
18 haven't told your colleagues about the last case in
19 which we were together, have you?

20 MR. HOCKHEIMER: Just bits and pieces,
21 Judge. No, it was a great case. It was a lot of
22 fun.

23 THE COURT: Yes. It involved something
24 that we were able to resolve very easily, and it was
25 in large part -- and I'm not patting you on the back

1 because I'm not so sure you've done in this case what
2 you did in that case, but we came up with a way to
3 settle on a global basis a rather sensitive issue
4 involving what I consider to be inadvertent
5 eavesdropping by a school district on students in an
6 ill-advised effort to track down computers. And --
7 but we resolved the whole thing. We set up a program
8 and all of the cases were resolved. I'd like to do
9 something like that here.

10 So we're going to talk about the pending
11 motions, the discovery issues. We're going to adopt
12 a schedule. And we're also going to talk about
13 settlement. I've looked through the file. I haven't
14 read everything, of course. I don't see any
15 reference to settlement. I don't know whether there
16 have been any settlement discussions. But Mr.
17 Hockheimer can tell you I have a super magistrate
18 judge paired with me. He was with me in my law firm
19 in the 1980s. He became an AUSA, did very well, then
20 became magistrate judge, then chief. And now,
21 unfortunately, although he's considerably younger
22 than I, he's retiring, and he'll retire the end of
23 June. But until then, he's available for settlement
24 conferencing, and we're going to address how that
25 should be handled. I require an investment of the

1 parties in any settlement discussions. I don't order
2 settlement conferences. I let the parties tell me
3 whether they agree that settlement conferencing -- it
4 certainly wouldn't be one conference in this case. I
5 let the parties tell me that settlement conferencing
6 might be of assistance in resolving the case. And
7 before we adjourn, we're going to address that issue.
8 We'll add it to the schedule.

9 I'm going to tell you something about the
10 schedule now. You've given me a lot of dates in
11 terms of how much time you need, ten weeks, 12 weeks,
12 16 weeks. I want to know start to finish on your
13 schedule, and I think your schedule is triggered by
14 my rulings on the discovery motion. So you can --
15 and the motion to dismiss. But let me take a quick
16 look.

17 Well, it's just the -- it's the start, the
18 first item on the -- your schedule, "Disclosure of
19 experts," four weeks after resolution of the motion
20 to enforce. I want someone to figure out how much
21 time that will take start to finish. And then we'll
22 plug in how long I think it will take to address the
23 discovery issues. I need to know more about them
24 before I can decide how much time that will take.

25 All right. Let's start with an easy issue.

1 The file reflects the liaison counsel, but I saw no
2 order designating liaison counsel. Was there one?
3 If you don't know, we'll issue a new one.

4 MR. HOCKHEIMER: I don't believe so, Judge.

5 THE COURT: From the file as we have it, I
6 gather liaison counsel for Eddystone is Steven
7 Barber?

8 MR. AGUSTI: Your Honor --

9 THE COURT: Two Steven Barbers?

10 MR. AGUSTI: No, Your Honor, this is Fil
11 Agusti. I would be the lead counsel for Eddystone,
12 Your Honor.

13 THE COURT: Fine. Fine. And Mr.
14 Hockheimer, is sitting in the number 1 seat because
15 he's local counsel, is that --

16 MR. HOCKHEIMER: That's right, Judge. I
17 tried to sit way over there, but they put me here so
18 I'm here.

19 THE COURT: I find him to be little more --
20 little more -- a lot more than local counsel.

21 MR. HOCKHEIMER: Thank you, Judge.

22 THE COURT: Good. Well, I'm going to issue
23 an order appointing liaison counsel, and it's just
24 really for purposes of communicating with you all. I
25 don't want to have to track down a lot of others,

1 just the person who will be able to feed whatever I
2 say to all others.

3 For the BLFG defendants, Jacob Kramer,
4 Bryan Cave.

5 MR. KRAMER: That's me, Your Honor.

6 THE COURT: Welcome --

7 MR. KRAMER: Good morning.

8 THE COURT: -- Mr. Kramer.

9 MR. KRAMER: Good afternoon.

10 THE COURT: And welcome to you too, Mr.
11 Barber.

12 MR. BARBER: Thank you, Your Honor.

13 THE COURT: For Defendants Rios and Gamboa,
14 Jeremy Fielding.

15 MR. FIELDING: Yes, here, Your Honor.

16 THE COURT: Mr. Fielding.

17 MR. FIELDING: Yes, Your Honor.

18 THE COURT: And for Third-Party Defendant
19 Jamex, which I think is out of the case -- is anyone
20 here representing Jamex?

21 SPEAKER: No.

22 THE COURT: We ought to take them off the
23 docket. They're still on the docket, and we'll do
24 that. I also want to recognize Mr. Scheff certainly.

25 MR. SCHEFF: Good afternoon, Your Honor.

1 How are you?

2 THE COURT: Yes, I'm fine. My recollection
3 is that Mr. Scheff and I -- we didn't clerk at the
4 same time because I'm a good deal older, but you did
5 clerk for one of my colleagues.

6 MR. SCHEFF: That's correct, Your Honor,
7 Judge Derr (sp).

8 THE COURT: Yes. And we all -- we all miss
9 Judge --

10 MR. SCHEFF: We do.

11 THE COURT: -- Derr.

12 MR. SCHEFF: Thank you.

13 THE COURT: All right. Well, we'll take
14 the Jamex defendants off the docket. No liaison
15 counsel needed.

16 As far as the motion to dismiss is
17 concerned -- we'll talk about the two motions -- I
18 think there is enough on the record for me to decide
19 the motion. I don't have the date of -- yes, I do.
20 It was filed October 25th. So it isn't -- it isn't
21 that old, and I gather Judge Kelly was rather busy at
22 the end of his term. I don't know when he shared
23 with you his retirement, but he didn't share it with
24 us until I would say sometime in October. It was
25 late. But in any event, I think the motion to

1 dismiss is fully briefed and ripe for decision. Any
2 disagreement?

3 MR. SCHEFF: None from us, Your Honor. We
4 filed the motion.

5 THE COURT: I wish I could say the same
6 thing about the discovery, but -- and one solution
7 would be for me to read all the documents that are
8 out there, but hundreds -- and I don't know how
9 many -- there are hundreds of documents. I don't
10 know how many pages in each document. That is not
11 something I intend to do.

12 MR. AGUSTI: Your Honor, we're happy to
13 address it when you would like for us to.

14 THE COURT: Do you have a shortcut to
15 resolving it in --

16 MR. AGUSTI: Your Honor, we've --

17 THE COURT: -- an appropriate way?

18 MR. AGUSTI: -- proposed (indiscernible).
19 I'm happy to share it with Your Honor right now if I
20 may.

21 THE COURT: That's exactly what I want to
22 hear.

23 MR. AGUSTI: Yes, Your Honor.

24 (Pause in proceedings.)

25 MR. AGUSTI: Your Honor, as the plaintiffs

1 in this case --

2 THE COURT: I think you ought to identify
3 yourself for the record.

4 MR. AGUSTI: Yes, Your Honor. I'm Fil
5 Agusti. May it please the Court? I represent
6 Eddystone, the plaintiff in this case. Your Honor,
7 we are plaintiffs and we filed this case that we've
8 just had our third year anniversary and we're not
9 still finished with fact discovery. And so we're
10 quite anxious to shortcut things and to -- and to get
11 to a solution. And, naturally, we understand that a
12 solution does not involve Your Honor reviewing 95,000
13 documents. So, basically, the --

14 THE COURT: Well, we've lost five. I
15 thought there were -- somewhere you came up with the
16 figure of -- no corroboration or no detail, but you
17 came up with a figure of 100,000. Thank you --

18 MR. AGUSTI: Yes, Your Honor.

19 THE COURT: -- for relieving me --

20 MR. AGUSTI: And let me -- let me just --

21 THE COURT: Thank you for relieving me of
22 that task, which I was never going to undertake.

23 MR. AGUSTI: Your Honor, let me just take
24 it from the top. So, Your Honor, this --
25 essentially, we've had -- the reason why we're still

1 in discovery is because we've had a lot of delays
2 by -- because of the difficulty in trying to get the
3 documents in this case. Believe it or not, Your
4 Honor, document discovery in this case ended on
5 August 13, 2018, but we've had to have two sets of
6 motions to compel.

7 First, Your Honor, you may recall from the
8 joint report that there --

9 THE COURT: The redacted report?

10 MR. AGUSTI: Pardon me?

11 THE COURT: I thought the redacted report
12 was very interesting, and we had to come back to you
13 for an unredacted report.

14 MR. AGUSTI: I --

15 THE COURT: You saw -- did you see the
16 redacted report?

17 MR. AGUSTI: Your Honor, I really focused
18 more on the -- on the full, unredacted report, but --

19 THE COURT: The redacted report was very
20 interesting. It told me absolutely nothing.

21 MR. AGUSTI: Your Honor, I apologize if --

22 THE COURT: No, that's all right.

23 MR. AGUSTI: It's -- a lot of things are
24 redacted. Your Honor, just to be clear from our
25 side, we do not have any concern with the record

1 being fully on public display. We do have an
2 agreement with the other side. They have been
3 redacting large parts of the record and, you know,
4 we're happy to accommodate it so long as our case
5 moves forward. But, Your Honor, just to be clear, we
6 don't have any -- we -- as far as we're concerned, if
7 there was no redaction go, we would be very happy.
8 In any event --

9 THE COURT: That's because none of your
10 confidential documents are out there, or maybe none
11 of your confidential information is.

12 MR. AGUSTI: None of our confidential
13 information is at issue, Your Honor.

14 THE COURT: Right.

15 MR. AGUSTI: So --

16 THE COURT: You may continue.

17 MR. AGUSTI: So in any event -- so this
18 issue that we've got, this problem that we all have
19 on the -- on the documents, just to put it in context
20 on chronology, we received the privilege log six
21 weeks after the discovery cutoff date. The first --
22 the first version of it, which is about September
23 26th, 2018, we promptly filed our crime fraud motion.
24 There were then a couple of modifications of that
25 privilege log in October. There was a very long and

1 very exhaustively briefed motion on crime fraud,
2 there was a long hearing on it, Your Honor, with just
3 about everybody here present. After the -- after the
4 hearing, Judge Kelly decided to look at some 840
5 documents, sampling, and he ruled on June 28th that
6 we should have the documents.

7 THE COURT: Well, not all of the documents
8 that were reviewed.

9 MR. AGUSTI: Yeah, four cat -- yeah, four
10 categories of privileged documents, Your Honor,
11 that's correct. And so --

12 THE COURT: But the sample for ex parte
13 review, as I understand it, was based on 40 specific
14 subject lines.

15 MR. AGUSTI: Yes, sir, that's right.
16 That's right. And the sample that he looked at was
17 altogether --

18 THE COURT: 840.

19 MR. AGUSTI: -- 840, and he took that as a
20 sampling to determine what the -- whether the --
21 whether the crime fraud exception had been satisfied
22 in a more general way. And he satisfied himself of
23 that, and on June 28th, he issued an order ordering
24 production of those documents. That order was --

25 THE COURT: Not all of the documents.

1 MR. AGUSTI: Pardon me, Your Honor?

2 THE COURT: Not all of those documents. He
3 ordered production of documents that fell into four
4 categories.

5 MR. AGUSTI: Yes, sir, into four
6 categories. Correct. Correct. The categories were
7 documents that have to do with the so-called
8 restructuring of BTS, documents that have to do with
9 the transfer of assets and revenue streams from BTS,
10 Bridger Transfer Services, to other Ferrellgas
11 subsidiaries in an attempt to avoid -- to strip the
12 company. He ordered all documents that relate to
13 the -- to the cessation of the contract with the
14 refinery downstream to which the facility was
15 shipping the petroleum.

16 THE COURT: You're talking --

17 MR. AGUSTI: And so -- and so there were
18 four categories of documents that were -- that he
19 ordered be produced of the attorney-client privilege
20 documents. So that's the baseline.

21 The other side appealed that order to the
22 Third Circuit. That appeal took three months, and
23 about September 27th of 2019, we had an order denying
24 the appeal from the Third Circuit. We promptly asked
25 that the documents be produced, and of the 100,000

1 documents, about a little under 5,000 documents were,
2 in fact, produced by the other side. But as we've
3 talked about a little bit in our -- in our motion to
4 enforce, and as I can describe today if Your Honor
5 likes, it's relatively clear that there are documents
6 out there that have not been produced.

7 The problem that we're up against is that
8 we haven't seen any of these documents and the
9 descriptions are incredibly vague. So, for example,
10 there are 6,000 documents that are described in
11 exactly the same word -- words. They say something
12 to the -- to the -- attorney-client communication,
13 privileged, that's the entire entry on the privilege
14 log. Clearly, we have no idea what the document
15 says.

16 There are other variations. For example,
17 there are hundreds, I think probably thousands, but
18 we haven't counted them, that say attorney
19 consultation. There are hundreds of documents where
20 the description of the document simply says ray (ph).
21 And so we -- sitting on the outside, while for a lot
22 of reasons, we suspect that there are documents that
23 haven't been delivered. For example, in -- as Your
24 Honor probably knows from looking at our joint status
25 report, the accounting records that we finally

1 obtained after going through two sets of motions to
2 compel show clearly that money, that revenue, was
3 diverted from BTS on contracts that BTS owned. And
4 remember, Your Honor, just to --

5 THE COURT: Excuse me a minute.

6 MR. AGUSTI: Yes, Your Honor?

7 THE COURT: I, unfortunately, have in front
8 of me the copy of the joint status -- there are pages
9 that go on like this. I don't know whether you
10 started -- Nick, I don't have the -- the status
11 report.

12 (Pause in proceedings.)

13 MR. SCHEFF: Your Honor, I have an
14 unredacted one if you --

15 THE COURT: I -- no, I have it. It's here.
16 Thanks, Mr. Scheff. It's here in the -- in the
17 papers that -- it was here.

18 (Pause in proceedings.)

19 MR. AGUSTI: Your Honor, I'm happy just to
20 summarize --

21 THE COURT: I have it.

22 MR. AGUSTI: -- the key facts. Okay, Your
23 Honor.

24 THE COURT: Okay.

25 MR. AGUSTI: So --

1 THE COURT: Go ahead.

2 MR. AGUSTI: So, Your Honor, basically --

3 THE COURT: Direct me to a page.

4 MR. AGUSTI: I don't have a page reference,
5 Your Honor. I was just talking generally about
6 the -- about the case, so I do not have a page
7 reference to what I'm about to say.

8 THE COURT: All right. Well, then say it.

9 MR. AGUSTI: If I may. So, Your Honor --
10 so the -- so our -- so we found that there were
11 basically two waves of stripping BTS. As Your Honor
12 knows, basically, the case revolves around a contract
13 between our client and Bridger Transfer Services. As
14 of May 2015, Bridger Transfer Services was a very
15 substantial organization. The defendants,
16 Ferrellgas, paid \$800 million -- over \$800 million
17 for the Bridger Group of companies. Bridger Transfer
18 Services provided over 50 percent of the operating
19 revenues of Bridger Group. It also provided over 40
20 percent of the profits for Bridger Group. So it's a
21 substantial company that had a contract with us.
22 So -- but they had a problem and that problem was I
23 guess the Eddystone contract. And that's because the
24 Eddystone contract was really a risk that they had
25 taken, was based upon the differential between the

1 price of crude petroleum in North Dakota and the
2 price of crude petroleum in the North Atlantic, which
3 is called Brent.

4 What had happened is that those -- there
5 had been a change in that and it turned the contract
6 into a loser. And so they decided that the way to
7 get out of a loser was basically to strip BTS of all
8 of its assets. And by seven months, six months
9 later, January '16, January of 2016, the BTS, our
10 counterparty, had been stripped from a company that
11 provided 50 percent of the operating revenues of a
12 group for which it had paid \$800 million into a
13 company that had zero assets and that they sold off
14 for ten dollars to a third party in order to make it
15 harder for us to bring a fraudulent transfer action.

16 So that's essentially the background. Now,
17 the stripping occurred in two stages.

18 THE COURT: The change that you've just
19 described, is that the change in the oil market
20 generally? I don't follow Brent crude prices, but
21 the oil market tumbled. I don't remember exactly
22 when.

23 MR. AGUSTI: Yes, Your Honor. Actually,
24 it's -- the key thing is it diff -- there was a --
25 the key difference isn't so much the overall crude

1 market, although our expert -- our experts will
2 explain that that has something to do with it, but
3 it's really the differential between the price that
4 you pay in Philadelphia --

5 THE COURT: And the price in North Dakota?

6 MR. AGUSTI: -- for Brent -- pardon me?

7 THE COURT: And the price in North Dakota?

8 MR. AGUSTI: Yes, sir. And when this
9 contract started the price in North Dakota was a lot
10 cheaper. And so when -- it was so much cheaper that
11 it made sense to stick it in a rail car in North
12 Dakota and ship it all the way down here, take it to
13 our transloading facility, and put it into a Delaware
14 River barge and take it down to a refinery eight
15 miles downstream, the Monroe Refinery. And so -- and
16 the alternative to that for the Monroe Refinery is to
17 buy petroleum from the -- that's priced at North
18 Atlantic prices, and those are called Brent. That's
19 the benchmark price. And it turned out back then,
20 when they started doing this, that there was a huge
21 gap and it more than paid for the -- it cost a lot
22 more money to rail petroleum across the country than
23 it does to put it on a boat in West Africa and float
24 it to Philadelphia.

25 So, basically, the deal depended upon that

1 differential. What happened over time was that their
2 bet didn't pay off and the differential eroded to the
3 point where it was almost equal. And a lot of that
4 had --

5 THE COURT: Because of --

6 MR. AGUSTI: -- to do, Your Honor, with --

7 THE COURT: Because of the increased cost
8 of extracting the North Dakota oil?

9 MR. AGUSTI: No. No, Your Honor. I -- why
10 oil prices change is something that's, unfortunately,
11 way beyond my (indiscernible), or maybe I would be an
12 oil trader. But what happened was that the price of
13 oil -- of oil in North Dakota, basically, it dropped,
14 but it didn't -- but, basically, it didn't drop as
15 much as the oil that was coming across from West
16 Africa as a result of the events in -- with Saudi
17 Arabia in the fall of -- beginning in the fall of
18 2014 but continuing.

19 So, Your Honor, what happened as an
20 economic matter was that what had been a good deal
21 based upon this differential between what was then
22 cheap North Dakota oil and expensive Brent oil didn't
23 make sense anymore. The prices had -- you know, had
24 basically coalesced so that there was a very small
25 differential in price and you had this massively

1 higher cost of transporting it on rails all the way
2 to Philadelphia. So that's the fundamental problem,
3 the real-world problem that went on with them that
4 caused them to think that this was a bad contract
5 they wanted to get rid of. But as part of entering
6 into the deal, we built this facility in Eddystone,
7 just south of Philadelphia, and it cost a lot of
8 money to do that, and we wouldn't have done that if
9 we didn't have a commitment from BTS to go ahead and
10 take petroleum for us -- from us for five years.

11 So our deal was look, it's a -- it's a
12 classic take-or-pay contract, the kind that you find
13 in the oil industry all the time. Basically, look,
14 what BTS said is we'll deliver to you 65,000 barrels
15 of petroleum per day, or to the extent that we don't,
16 we will pay you a minimum volume payment, right? And
17 what that does is it gives us some -- it gives us,
18 the people who are spending all this money to build
19 the facility, some assurance that we're going to get
20 our money back for building this facility. And that
21 was the -- that was the gamble that they had taken
22 and that was what BTS -- or what the owners of BTS,
23 better said, because they dealt with BTS as if it was
24 a play thing. What they said, well, we have a smart
25 idea for getting out of this contract. We'll just

1 strip BTS so that it's judgment proof and then we'll
2 default on the contract.

3 So that's exactly what they did. Beginning
4 in July 1, 2015, they -- which was the very first day
5 that -- remember I said that Ferrellgas bought this
6 company for about \$800 -- or group of companies for
7 about \$800 million beginning -- that was effective on
8 July 1, 2015. From that day, the money starts going
9 not to BTS -- this is on contracts where clearly BTS
10 is the contract party. The revenues from those
11 contracts start going out to other companies, and in
12 some cases, to companies that don't even exist. And
13 in order -- there's a small amount that's left over.
14 After all, BTS did have a payroll. But prim -- but
15 the overwhelming majority of its \$104 million in
16 annual revenues that they had in 2014 are suddenly
17 going someplace else.

18 Ultimately, by January 2016, February 2016,
19 they go ahead and they make an arrangement with this
20 refinery downstream, completely unknown to us, and
21 they then just literally take the contracts, take all
22 the assets that BTS has, and they transfer those
23 assets to other companies. And then one fine day,
24 February 1, is the last train that BTS delivered
25 to -- and I should say they also sell the corporate

1 shell because at that point, this substantial company
2 of mid-2015 was zero. They take that company and
3 they sell it for ten dollars to a third party, a
4 third party under some, you know, corporate structure
5 where the company is actually owned by another
6 assetless company, et cetera.

7 So in any event, Your Honor, on February 1,
8 they stop delivering crude. And from that day
9 forward, they don't make any minimum volume payments.
10 They just flat out default. And what we did next is
11 we brought in arbitration. We -- obviously, we
12 didn't know that this had happened. We brought in
13 arbitration. During the course of the arbitration,
14 we learned what had happened. We settled with the
15 new owners of BTS, and then we brought this action --

16 THE COURT: The new owners being Jamex?

17 MR. AGUSTI: Yes, sir. Yes, Your Honor.

18 The series of -- James Ballengee and the Jamex
19 companies. And then beginning in -- and then
20 beginning in February of 2017, we brought this
21 lawsuit. So we're a little bit past the third year
22 anniversary.

23 So we conducted discovery, we -- as I said
24 earlier, we had document production that was under
25 the -- Judge Kelly's initial order ended on August

1 2018. We had some difficulties getting the
2 accounting records. We finally got the accounting
3 records. And then, of course, we had the crime fraud
4 motion, the crime fraud motion that we filed just
5 within a couple of weeks after receiving the first
6 version of their privilege log, and was finally
7 resolved through the Third Circuit September 27,
8 2019.

9 So the problem that we have right now, Your
10 Honor, is the problem there are some documents that
11 we can tell are probably relevant. And so we've
12 asked in the motion to enforce that someone, Your
13 Honor or magistrate, take a look at those documents.
14 But then that leaves a -- and that's a very limited
15 number of documents. But that leaves --

16 THE COURT: You're talking now about the
17 documents in the ex parte submission that weren't
18 ordered produced. 841 documents were produced.

19 MR. AGUSTI: Yes, sir, and we've asked for
20 those.

21 THE COURT: 724 of those documents -- I'm
22 sorry, were produced for in-camera review. 724 of
23 those documents were, according to Judge Kelly,
24 within his description of the categories that were
25 subject to the crime fraud exception --

1 MR. AGUSTI: Yes, sir, Your Honor.

2 THE COURT: -- the four subjects. So
3 you're talking about production of what?

4 MR. AGUSTI: So -- Your Honor, so we're
5 talking -- we've filed a motion to enforce. That,
6 basically -- there are -- looking at the privilege
7 logs, we have tried to discern a narrower set of
8 documents that we think also fall within Judge
9 Kelly's categories. And so we've asked --

10 THE COURT: Of the documents --

11 MR. AGUSTI: -- for production.

12 THE COURT: -- that were produced for the
13 in-camera review?

14 MR. AGUSTI: Yes, Your Honor, that they be
15 produced for in-camera review. Those are a narrower
16 set of documents. And then --

17 THE COURT: You're talking about the
18 difference between 724 and 841, 117 documents?

19 MR. AGUSTI: No, no, Your Honor, I don't
20 know off the top of my head how many additional
21 documents we're seeking. I'll ask my colleague and
22 I'll be sure and get you the answer later on, but it
23 is -- it's a number of documents in the hundreds of
24 documents --

25 THE COURT: And how --

1 MR. AGUSTI: -- that --

2 THE COURT: And how many pages is in the
3 average document?

4 MR. AGUSTI: Your Honor, I can --

5 THE COURT: Are they one-page doc --

6 MR. AGUSTI: I can give you the answers to
7 those questions, but I honestly do not have them
8 right now. But the -- but the second -- the larger
9 problem -- and we think that those are a number of
10 documents that Your Honor or a magistrate could
11 review and make calls as to whether they fall in or
12 not. But that, Your Honor, leaves us with a massive
13 number of documents on which they've taken -- they've
14 asserted privilege that we don't have any idea what
15 they are. There are -- there are -- Your Honor, just
16 to give you an example, there are 6,000 documents
17 that have exactly the same description, something
18 along the lines of attorney-client confidential
19 communication. We have no idea what that document
20 says. The other descriptions are "Consultation with
21 attorney." We have no idea what that document
22 relates to. You're talking about thousands of those
23 documents.

24 So, Your Honor, from where we are right
25 now, we can tell because there's gaps in the

1 evidence. For example, there's -- I'll give you
2 another example. In a document that was produced was
3 a -- are some emails involving one in-house counsel
4 in January 2016 that talks about playing in the -- in
5 the UFTA sandbox. UFTA, of course, is an acronym for
6 the Uniform Fraudulent Transfer Act, one of the model
7 transfer acts throughout the United States. The
8 other one is UFCA, the Uniform Fraudulent Conveyance
9 Act. He refers to that one too and refers in a
10 couple of emails about facing UFCA risks. But it is
11 clear from the context of the emails that this --
12 he's referring to prior discussions that they've had.
13 And yet we don't have a single document of these
14 many, many thousands of documents that address this.
15 So we feel certain that there are gaps. So here's
16 what -- the solution that we have posed to the other
17 side as a way of cutting through all this without
18 having -- the impossible without having to have the
19 Court do it or a magistrate look at that many
20 documents.

21 What we would do is do what we do with any
22 of the massive numbers of documents that are produced
23 in modern cases. Basically, we would put together
24 some computer keywords or keyword strings, which is
25 the way we normally deal with millions of documents

1 that we get in discovery, and see whether we can get
2 a reasonable body of documents. If the strings are
3 sufficiently specific, we can get -- we can hit
4 documents that will be relevant. And, thereby, we
5 will be able to reduce this 95,000 -- this body of
6 95,000 documents to a smaller body of documents
7 that -- you know, that a court or the magistrate can
8 take a look at and say right away whether this is
9 something that falls in the category or not.
10 Surely -- for example, surely if this in-house lawyer
11 was talking in mid-January about referring to prior
12 discussions about the UFTA and the UFCA, there are
13 documents, emails, referring -- containing those
14 prior discussions. We would put in a keyword term,
15 theoretically, where we just refer to UFTA or
16 fraudulent transfer, and documents should come up
17 that are rel -- clearly relevant to the category --
18 to, actually, a couple of the categories that Judge
19 Kelly referred to.

20 So the way we would go at dealing with
21 this, Your Honor, is first of all, as to the
22 documents that we think, you know, from looking at
23 this very, very hard, these additional I believe few
24 hundred documents that we have looked at the
25 privilege log and, based on the timing and, you know,

1 the modest description, we think are relevant, what
2 we would do, we would ask the Court to -- or
3 magistrate to take a look at these hundreds of
4 documents, and then the next -- and then we would
5 propose to the other -- what we have proposed to the
6 other side is that we have a keyword search of these
7 documents, like we do any large body of documents, in
8 order to try to get just those documents that are
9 relevant and that are a sufficiently small group of
10 documents that a -- you know, a magistrate or Your
11 Honor could go through them and make a determination
12 of what falls within Judge Kelly's -- Judge Kelly's
13 order. So that's what -- how --

14 THE COURT: Well, are you still talking
15 about documents that fall within the crime fraud
16 exception?

17 MR. AGUSTI: Yes, sir. Yes, sir. Yes,
18 sir. All of these documents are documents on which
19 they have taken the attorney-client privilege.
20 There's -- they took the attorney-client -- they've
21 asserted the attorney-client privilege on about
22 100,000 documents, and as I said, you know, it's --
23 we think -- obviously, this is in violation of their
24 obligations, but we think the descriptions are -- do
25 not give -- permit us to make any assessment of

1 whether the documents are, in fact, privileged or not
2 because, you know, how can you -- if you've got a
3 document which says that it's regarding an attorney
4 consultation, well, what about? And with that kind
5 of a -- with that kind of a description, it's
6 impossible to tell -- for us to tell, who are not
7 looking at the documents, whether they relate to our
8 case or not.

9 I would say, you know, Your Honor, to start
10 with I mean it's not like we are going into a mass of
11 documents that are completely irrelevant to the case.
12 For the defendants to have placed those on a
13 privilege log, they had to make, you know, an initial
14 determination that the documents were relevant to our
15 lawsuit. They may not be relevant to the -- to the
16 categories that Judge Kelly described in his -- in
17 his June 28th order, but they certainly are relevant
18 to this case. And we suspect that there, you know,
19 will be a fair number of documents that we have not
20 had an opportunity to deal with that -- or that we've
21 not had an opportunity to review that we'll have
22 available to us at that point. And, Your Honor, as
23 you --

24 THE COURT: And you believe this proposal
25 will bypass the need for the defendants to take

1 another look -- and I'm being kind -- based on your
2 argument, take another look at their privilege logs
3 and redo them? You're not -- you're not asking for
4 that?

5 MR. AGUSTI: Your Honor, the reason I'm not
6 asking for that is because we've already tried that a
7 few times and it's not really worked out all that
8 well. And so I think that we really would like to
9 have, you know, something neutral like a keyword
10 string, fish out these documents. I mean obviously
11 any time that they want to look at more documents and
12 produce more documents, we would be very pleased to
13 have them. But they have opposed our motions so far.
14 And this, of course, is the key thing that at this
15 point is holding up the end of dis -- of fact
16 discovery.

17 All of -- one thing we do agree on, Your
18 Honor, is that we've got about nine depositions left.

19 THE COURT: How many have you taken?

20 MR. AGUSTI: We've taken 11, Your Honor.
21 The 11 that we've taken are primarily theirs of us
22 because we don't have the same issues. So they have
23 I think one deposition left of a corporate
24 representative, and we have eight depositions of
25 theirs. And the -- basically, the depositions are

1 being held up pending the production of these
2 documents because obviously a lot of these documents
3 are going to relate directly to the testimony a lot
4 of these people -- if the logs tell us nothing, they
5 tell us that a lot of these people are often involved
6 in some of these attorney consultations.

7 So, Your Honor, we would -- that -- once we
8 have those documents, then there's -- then I think if
9 you look at page 31 of at least the unredacted status
10 report, you'll see the competing proposals -- the
11 competing proposed schedules there. We all agree
12 that we need to have a resolution and a production of
13 the attorney-client -- what I call I guess the crime
14 fraud documents. And once that happens, then, Your
15 Honor, the way that you will see a table that shows
16 the parties' two --

17 THE COURT: I --

18 MR. AGUSTI: -- proposals --

19 THE COURT: I have it.

20 MR. AGUSTI: -- for how much time we should
21 take from that trigger point, the trigger point being
22 the point at which those documents are produced, the
23 time that we would take to take depositions. I think
24 you'll find that consistently our time is narrower
25 than their time and -- is shorter is a better way of

1 saying it I guess. Fact discovery, we think we've
2 got nine depositions. We don't see any reason why we
3 can't do it in six weeks. They want ten. Expert
4 discovery, start to finish we say 11 weeks, they say
5 17. And you'll see, Your Honor, on and on. But,
6 basically, we have -- we're plaintiffs, we've been at
7 it for three years, we think it's long past time for
8 us to get going, we very, very, very much want to get
9 going. And so we -- you have before you the two
10 positions on where we would take the schedule once
11 these crime fraud documents are produced to us.

12 THE COURT: Where is the proposed agreement
13 in terms of -- I'm talking about the proposed
14 agreement regarding the computer searches for these
15 additional --

16 MR. AGUSTI: There is --

17 THE COURT: -- records.

18 MR. AGUSTI: There is no proposed
19 agreement, Your Honor.

20 THE COURT: Oh, I thought you had proposed
21 a --

22 MR. AGUSTI: We have proposed to them in a
23 meet and confer letter that we approach this --
24 approach it this way, and we have not yet received a
25 response to that proposal, Your Honor, but that's --

1 THE COURT: All right.

2 MR. AGUSTI: -- but that's how we propose
3 to resolve it.

4 THE COURT: Fine. Thank you.

5 MR. AGUSTI: Anything further, Your Honor?

6 THE COURT: Not now, but there will be.

7 MR. AGUSTI: I won't go away.

8 THE COURT: No, I know you won't.

9 MR. AGUSTI: Thank you, Your Honor.

10 THE COURT: Who wants to respond?

11 MR. KRAMER: Hello again, Your Honor. Jake
12 Kramer for the Bridger and Eddystone defendants. Mr.
13 Scarborough is our lead counsel in the case, but I'm
14 going to talk about the crime fraud issues, and then
15 I'll turn it back to him to deal with the schedule if
16 that's all right with you.

17 THE COURT: All right.

18 MR. KRAMER: Okay. So we heard a lot there
19 from Mr. Agusti and there's a lot to unpack. I'm
20 going to do it as efficiently as possible. And I
21 thought what I would do is start with some background
22 and finish with where we are on ideas to move the
23 case forward because we have some too.

24 The first thing that you heard a lot is
25 that there are 100,000 documents at issue here on our

1 privilege log, and look, this is a collection action,
2 and Eddystone has been very aggressive in trying to
3 collect the debt from our clients.

4 THE COURT: Well, you're playing hide and
5 seek. They're seeking and you're not coughing up.

6 MR. KRAMER: That's certainly the
7 allegation, that we're playing hide and seek, Your
8 Honor, but we have done nothing but try to comply
9 with this order. We've produced 4,533 privileged
10 communications and we did it within three weeks of
11 the appeal --

12 THE COURT: That's commendable.

13 MR. KRAMER: -- terminating.

14 THE COURT: That's commendable unless there
15 are an additional 10,000 documents that should have
16 been produced.

17 MR. KRAMER: That's absolutely right, Your
18 Honor.

19 THE COURT: Look, you're talking to someone
20 who's been involved in discovery disputes both as a
21 lawyer and as a Judge for years and years and years,
22 so telling me you produced 4,000 doesn't tell me very
23 much unless the universe is 4,000. They say the
24 universe is much, much greater.

25 MR. KRAMER: Uh-huh. Okay. Well --

1 THE COURT: We're going to have to come up
2 with a way to test the defense position --

3 MR. KRAMER: There's --

4 THE COURT: -- that they've produced
5 everything.

6 MR. KRAMER: There's no question about
7 that, Your Honor, because we're at loggerheads about
8 whether we've complied with the order or whether we
9 haven't complied with the order. When you think --

10 THE COURT: Well, you -- and you've got --
11 you've got to come up with something that's realistic
12 or --

13 MR. KRAMER: Uh-huh.

14 THE COURT: -- else you're going to be
15 stuck with an order that -- well, if I err, I'm
16 certainly going to err in favor of disclosure under
17 facts of this --

18 MR. KRAMER: Well, that's what we've tried
19 to do in our review of the documents as well, Your
20 Honor. And we suggested an in-camera review to
21 resolve this situation. The proposals that we
22 received were give us all the documents that haven't
23 yet been turned over. We'll take a look at them,
24 decide what falls within the order --

25 THE COURT: Well, that's not --

1 MR. KRAMER: -- and --

2 THE COURT: -- going to work either --

3 MR. KRAMER: Right.

4 THE COURT: -- because the documents that
5 were produced, as I read the motion papers, Judge
6 Kelly's initial universe was more broad than the
7 documents that he ordered produced. So saying
8 that -- produced the rest of the 841 documents
9 doesn't work. But there is another issue, the issue
10 that was raised by plaintiff's letter where they want
11 lots more documents. But what's wrong with the
12 plaintiff's proposition, the one that was advanced at
13 the end of that --

14 MR. KRAMER: Well --

15 THE COURT: -- background presentation?

16 MR. KRAMER: -- we just received that the
17 other day and we've started to look at it. The
18 letter we received was a little different than the
19 proposal we just heard, and I think the proposal we
20 just heard is more workable. The letter we received
21 said essentially you are cherry-picking the documents
22 that you're producing, intentionally withholding
23 documents that you've been ordered to produce, which
24 we reject as categorically false. And we've offered
25 to hand these documents over for an in-camera review

1 to test that proposition repeatedly.

2 THE COURT: Yes, but --

3 MR. KRAMER: But --

4 THE COURT: -- that's a goal not to be
5 desired. I'm not interested in reviewing a lot of
6 documents.

7 MR. KRAMER: Understood, and --

8 THE COURT: Right.

9 MR. KRAMER: -- therein lies --

10 THE COURT: My plate is pretty full. I
11 certainly have time to handle all of the cases on my
12 docket, but I'm not looking for lots of documents to
13 review in camera.

14 MR. KRAMER: Understood, Your Honor. So
15 the proposal we received, to answer your question --
16 and then let's talk about the scope of documents to
17 be reviewed. The proposal we received was run these
18 searches, produce the documents immediately, and the
19 situation will be resolved. What we just heard is
20 run these searches, we'll give them to a special
21 master and -- or a magistrate or Your Honor,
22 whomever, and a third party, a neutral -- someone who
23 is not advocating for their client will make the
24 decision about whether the documents fall within the
25 scope of the order. That's a lot more realistic.

1 I do think -- we've started to take a look
2 at the keywords. We just received this the other
3 day. We started to take a look at the keywords and
4 there are -- there are thousands of documents that
5 come out. Now, mind you, these are -- these are all
6 documents that we have reviewed repeatedly and
7 concluded that they do not fall within the four
8 categories that Judge Kelly identified. So, again,
9 we're happy to turn them over if we can get the
10 number down to a reasonable place that's palatable
11 from the Court's perspective and test that
12 proposition.

13 Operationally, Your Honor, the problem here
14 is that this motion came at us with a list of four
15 categories. You read the categories. You referred
16 to them earlier.

17 THE COURT: Well, not -- I referred to them
18 generally, not --

19 MR. KRAMER: Generally, yes.

20 THE COURT: -- the --

21 MR. KRAMER: The --

22 THE COURT: -- the restructuring of a
23 subsidiary, BTS; the transfer of a subsidiary, BTS's
24 assets and revenue streams, and they should be rather
25 easy to identify --

1 MR. KRAMER: Uh-huh.

2 THE COURT: -- I think. Three, the sale of
3 a subsidiary, BTS; and four, and this is not self-
4 explanatory, the cessation of a related shipping
5 arrangement. That's the shipping -- the North
6 Dakotan shipping arrangement?

7 MR. KRAMER: That's the arrangement through
8 which Jamex purchased oil in North Dakota, our
9 clients transported the oil to Philadelphia, it was
10 transloaded through the Eddystone facility from
11 railcars to barges, and then ultimately was delivered
12 to the Monroe Refinery, which is the Delta Airlines
13 refinery on the river here. So the cessation of that
14 arrangement is what prompted the default on the
15 contract --

16 THE COURT: I did not ask --

17 MR. KRAMER: -- by BTS.

18 THE COURT: -- Mr. Barber, the Delta
19 refinery is closed now, is it not?

20 MR. KRAMER: I don't know, Your Honor. I
21 think -- actually, the last I heard there was still
22 crude moving up the river in that direction, but I
23 don't know if it's happened more recently.

24 THE COURT: What about the structure that
25 was built by Eddystone?

1 MR. KRAMER: The Eddystone structure is
2 still in place. It's been -- as we understand it,
3 ownership has transferred to one of the joint
4 venturers in the Eddystone project and it is still
5 operational.

6 THE COURT: Is it operating?

7 MR. KRAMER: Well, we don't -- we don't
8 have an -- we don't have an up-to-date view on that,
9 Your Honor. Mr. Agusti probably knows the answer.
10 My understanding is last we checked, yes, it was
11 operating.

12 THE COURT: All right, you may continue.

13 MR. KRAMER: Thank you. So how many
14 documents are we dealing with? It's not 100,000.
15 There -- by way of background here, we do have a long
16 privilege log. There are approximately 65,000
17 entries. And the reason -- we actually -- we took
18 over this case. Before we did, an agreement was made
19 among counsel that any document that hit -- again,
20 here we are on the computer keywords -- any document
21 that hits on a keyword would be deemed responsive
22 unless it clearly was not, a spam email, something
23 just that no reasonable person could look at and
24 determine falls within the ambit of this case.

25 The keywords were negotiated among the

1 parties, and the results were voluminous. And any
2 document that hit on a keyword that we had negotiated
3 with the other side ended up on our privilege log.
4 So there's a lot of materials on there, and it takes
5 a lot of time to put a privilege log like that
6 together, and there are 65,000 entries. How many
7 entries really matter for purposes of this motion,
8 the crime fraud motion? We're really talking about a
9 universe of something like 25,000. So we're down all
10 the way already 75 percent from where we started. Of
11 those, which we've reviewed repeatedly to find the
12 documents that fall within these four categories and
13 to hand them over, we -- we've already produced, as I
14 said, 4,553. So the numbers -- the numbers change
15 when we put them in perspective as to the
16 proportions.

17 As to the descriptions in our privilege
18 log, we've been taken to task for that repeatedly,
19 and I think it's worth a little more background for
20 the Court. What we did in our privilege log, it was
21 voluminous -- and you see this happen sometimes in
22 cases like this -- we put the date, we put the
23 sender, we put the recipient, we put the subject line
24 of the email, we identified all the attorneys who are
25 listed as senders or recipients to show that the

1 documents were going back and forth among attorneys.
2 And to the extent there wasn't an attorney listed, we
3 ident -- we provided a more fulsome description so
4 that the other side can understand what happened.

5 The crime fraud motion was filed after we
6 received that. It focused principally on a period
7 from in the middle of 2015 and at the end of 2015 and
8 the start of 2016. So we voluntarily, after
9 receiving that motion, updated all of those
10 descriptions and we provided it to the other side,
11 and what we did is instead of using more generic
12 descriptions of the documents, we provided particular
13 descriptions document by document for 14,500 entries.

14 Right after we did that, the other side
15 protested, as they did earlier today, and said no,
16 you need to update the entire privilege log. We
17 talked about that, tried to come to some reasonable
18 resolution and understanding, and what we got was a
19 compromise proposal from Eddystone. And what it
20 says, and I can read, "Eddy" -- we've submitted it.
21 It's an exhibit to our opposition brief. "Eddystone
22 will accept a further amended privilege log in which
23 Ferrellgas has fixed all entries from September 1,
24 2014, through April 30, 2015, as a compromise."

25 So we did that. We updated another 10,000

1 privilege log entries. But the target keeps moving,
2 and once this motion was decided and we started
3 producing documents, the compromise has gone away.
4 And despite having accepted the agreement, we're
5 asked to update more privilege log descriptions and
6 taken to task for not doing it. So I think that's
7 important just to put that particular issue in
8 perspective.

9 The bottom line, Your Honor, we're dealing
10 with, like I said, two different periods of time. In
11 the middle of 2015, Ferrellgas acquired Bridger
12 Logistics. And the theory on the other side is that
13 immediately upon acquiring that company, Ferrellgas
14 and Bridger Logistics began diverting revenue from
15 BTS, the subsidiary. And the theory you just heard
16 espoused was Ferrellgas and Bridger Logistics did
17 this because the oil market was changing and it was
18 clear that this midstream logistics business bringing
19 oil from North Dakota to Philadelphia to the -- to
20 the refinery would not be profitable. That was the
21 business that drove the deal.

22 So the disconnect here is the question why
23 would our clients spend \$800 million to acquire
24 Bridger Logistics and immediately set about moving
25 and diverting revenue from a subsidiary because they

1 had just purchased a company whose principal line of
2 business, whose main contract, as Mr. Agusti said,
3 who -- which generated 40 to 50 percent of the
4 revenues and profits for the company, was failing?
5 It makes no sense.

6 In truth, the spread -- the spread between
7 the price of domestic oil in North Dakota and foreign
8 oil in Philadelphia narrowed after the acquisition.
9 The allegation is, nevertheless, that we invested
10 \$800 million to buy a failing contract and a failing
11 company and immediately set about to loot it. It's
12 not -- I'm not here to argue the merits, and Judge
13 Kelly didn't decide the merits in his opinion about
14 whether this particular conduct constitutes a fraud.
15 But if the plaintiffs haven't found the documents
16 that they're looking for and that has prompted them
17 to come to the Court and come to us and ask for more
18 documents, it's because they don't exist. There was
19 no fake entity to which revenue was diverted. There
20 was a realignment of the accounting structure
21 recommended by accountants, and none of that caused
22 BTS to lose revenue. And how could it if the entity
23 to which the revenue was diverted was never actually
24 formed? So then we move forward in time.

25 THE COURT: Well, what happened? I'm just

1 looking at a chart. Ferrellgas purchased Bridger
2 Logistics in June of 2015.

3 MR. KRAMER: That's right, June 24th.

4 THE COURT: And -- for all these millions
5 of dollars.

6 MR. KRAMER: Uh-huh.

7 THE COURT: What happened between June of
8 2015 and February of 2016 when Jamex acquired BTS for
9 ten dollars?

10 MR. KRAMER: A couple of things happened.
11 During that period, the spread narrowed and it became
12 economically unattractive for Monroe to buy oil from
13 North Dakota and for Jamex to sell oil from North
14 Dakota because it also had to cover the
15 transportation costs.

16 THE COURT: When did that start, that --

17 MR. KRAMER: That started after the
18 acquisition. And we put a -- we put a graph into our
19 opposition to the brief to show the spread narrowing
20 in around November of 2015. And there was another
21 important event happening at around the same time,
22 which is Jamex had liquidity issues and was unable to
23 obtain intermediation financing, which is something
24 provided by a lender, originally Merrill Lynch. Then
25 they were able to arrange financing from Carlyle.

1 It's complicated and I don't pretend to fully
2 understand it, but the basic principle is the lender
3 uses its balance sheet to purchase the oil, it holds
4 title to the oil until it's delivered, whereupon it's
5 paid off, and it's a way for a company like Jamex,
6 which is in the oil marketing business, to use the
7 balance sheet of a more sophisticated bank to
8 purchase and sell the oil. It's a credit sleeve.

9 THE COURT: You asked a question, a
10 rhetorical question, why would Ferrellgas pay \$800-
11 plus millions of dollars for BTS and then proceed to
12 disburse its assets, but I think you've just answered
13 it. The downturn in the oil -- well, it's not
14 exactly a downturn, but the narrowing of the prices
15 as between North Dakotan oil and North Atlantic oil
16 for crude --

17 MR. KRAMER: I --

18 THE COURT: -- occurred I gather without
19 any advance warning or not much advance warning,
20 occurred after the purchase for \$800 million, which
21 makes that purchase not such a good idea.

22 MR. KRAMER: Great question, Your Honor,
23 and I understand why you ask. To be clear, I'm
24 talking about two different time --

25 THE COURT: Well, you asked the question,

1 why --

2 MR. KRAMER: I know.

3 THE COURT: -- would they, and I think I've
4 just come up with at least an answer. You, of
5 course, will have an explanation for why they did
6 that.

7 MR. KRAMER: Well, my question was -- may
8 have been posed inartfully, but it was a little
9 different. Why would they do it immediately? Why
10 would they do it immediately upon purchasing the
11 company --

12 THE COURT: Yes, you did say immediately.

13 MR. KRAMER: -- in the middle of 2015?

14 THE COURT: Well, it turns out it's a few
15 months. I don't know whether that's immediately in
16 terms of selling companies. I guess a few months is
17 pretty immediate, but I leave that to you. That's
18 not an issue --

19 MR. KRAMER: Well --

20 THE COURT: -- on which we'll decide the
21 case.

22 MR. KRAMER: That's right. And I'm
23 responding to an allegation that it began essentially
24 on day 2, which isn't the case at all and --

25 THE COURT: Well, it began a few months

1 later.

2 MR. KRAMER: Well, here's what happened a
3 few months later. Jamex, the buyer and seller of the
4 oil, and Monroe, the purchase of the oil, didn't want
5 to be in the business of North Dakota crude anymore
6 because of that price change.

7 THE COURT: Was it just that or was there a
8 decline in the quality of the North Dakotan crude?

9 MR. KRAMER: No, I don't think it had
10 anything to do with quality. It's light, sweet
11 crude, which is fungible with crude from other places
12 in the world. It was -- it was principally the gap
13 between the cost to buy it and the price at which it
14 could be sold needed to accommodate the price of
15 transportation so there was margin left over. When
16 it shrinks the margin goes away and it doesn't make
17 sense from Jamex, the seller's, perspective. And
18 because of the decline in foreign crude prices, it
19 doesn't make sense from Monroe, the oil buyer's,
20 perspective.

21 So our clients are in the shipping
22 business. We move the oil from North Dakota to
23 Philadelphia. Jamex and Monroe decided that they
24 were going to put their arrangement on pause. They
25 consulted with our clients about it. And,

1 ultimately, there was a cessation in oil delivery.
2 Does that prompt our clients to, as you say, transfer
3 the revenue, transfer the assets out of BTS? Not
4 quite.

5 What also happens is Jamex, back to the
6 intermediation financing, hasn't been able to replace
7 its financing from Merrill Lynch, and it goes and it
8 talks to The Carlyle Group, and they're willing to do
9 it. And that's a way that Jamex could have kept the
10 oil moving before this -- before this cessation was
11 agreed. And Jamex was willing to do that because it
12 still made economic sense even with the price
13 differences. But they needed Eddystone to consent to
14 the intermediation financing agreement, and Eddystone
15 wouldn't do that. And the reason that they gave was
16 look, we don't have a direct relationship with Jamex,
17 we have a direct relationship with BTS; we're not in
18 privity with you, we're not going to negotiate with
19 you to put this consent in place.

20 The other thing is there were problems with
21 the facility. Because of the SEPTA schedule, trains
22 could only come in between midnight and 4:00 a.m. and
23 they could only leave between midnight and 4:00 a.m.,
24 which made it very difficult to hit the volumes that
25 everybody anticipated hitting at the outset. And on

1 top of that, in addition to some other problems, on
2 the way out of the facility, there's a big, granite
3 pinnacle in the channel, which effectively meant that
4 the barge could only sail at high slack tide if it
5 was loaded with oil, which is a very narrow window.
6 So you had a very narrow window coming into the
7 facility and a very narrow window coming out of the
8 facility.

9 So what Jamex wanted to do after it found
10 itself unable to obtain the financing it needed to
11 continue selling the oil was get into a situation
12 where it could negotiate with Eddystone, as it was
13 able to negotiate with Monroe and as it was able to
14 negotiate with my clients, and come up with a
15 solution for the problem for everyone. So Jamex
16 approached us, Jamex asked to buy the subsidiary,
17 BTS, and Ferrellgas looked into it.

18 Here, we hit the second period that's been
19 flagged in the crime fraud motion when BTS is sold to
20 Jamex and the assets are moved out of Jamex and --
21 excuse me, out of BTS and into other Ferrellgas
22 subsidiaries. Why does that happen? It doesn't look
23 great, but there's a -- there's an explanation.
24 Ferrellgas has this line of credit it's -- upon which
25 it relies for operating capital. Every subsidiary of

1 Ferrellgas is a guarantor on the line of credit.
2 It's part of the loan covenants. And it's been in
3 place since 2009. And the loan covenants prevent
4 subsidiaries from disposing of assets except under
5 certain conditions, and one of the conditions is they
6 can be transferred to other subsidiaries. So there's
7 a lien on these assets, which is a defense to a
8 fraudulent transfer claim.

9 The subsidiaries -- excuse me, BTS was able
10 to move the assets to other subsidiaries. The
11 natural conclusion is if these assets are liened up
12 already in favor of the bank, they're not available
13 to serve as recourse for any -- for Eddystone in any
14 event if it were to sue on the contract as an
15 unsecured creditor, so it should have no economic
16 effect.

17 Now, again, not here to argue the merits of
18 the fraudulent transfer claim, and Judge Kelly didn't
19 decide the merits. He didn't really address this
20 defense, which is a really important part of the case
21 when he issued his crime fraud decision. But that's
22 what was going on at the time, those assets were
23 moved out of BTS.

24 THE COURT: Are you saying all of the
25 assets moved out of BTS were fully liened?

1 MR. KRAMER: That's correct, Your Honor.
2 They were. There was a -- there was a lien in favor
3 of Bank of America, which was the lender for
4 Ferrellgas. Now, there were some paperwork issues
5 related to the lien. The security statement was --
6 the UCC statement was perfected in advance of the
7 transaction. It was a little late. There were some
8 mistakes on the bank side. But when the other side
9 says hey, we've looked at these documents that you've
10 produced, as they did in their most recent letter,
11 and we don't see the documents that we think should
12 be there, this is an explanation. This is why,
13 because the documents that Mr. Agusti mentioned --

14 THE COURT: Did you share this information
15 with the plaintiff's side?

16 MR. KRAMER: Yes, it's featured prominently
17 in our defense of the case, including the crime fraud
18 motion, and it was one of the things --

19 THE COURT: Have you provided proof of the
20 lien?

21 MR. KRAMER: Yes, Your Honor.

22 THE COURT: Is there any question as to
23 lien priority?

24 MR. KRAMER: I don't believe so, Your
25 Honor. The -- stepping back, you know -- and this is

1 one of the reasons that Eddystone is in the situation
2 that it's in now, trying to collect not from its
3 counterparty in the contract, but from others in a
4 rather aggressively-postured collection action, there
5 was no parental guarantee or security in the contract
6 it entered into with BTS, so it had no security
7 interest in any of these assets at all.

8 THE COURT: By "parental guarantee," you
9 mean BTS's parent?

10 MR. KRAMER: That's right. There was no
11 collateral pledged as part of the contract, there was
12 no performance bond, there was no security at all.
13 So there's no question that the bank is ahead of
14 Eddystone as a creditor. And indeed if it were to
15 sue, it would have to obtain a judgment before -- and
16 even then it would be an unsecured creditor with a
17 judgment behind the bank. So that's a big part of
18 the case. And --

19 THE COURT: Are you telling me this is all
20 discovery in aid of execution?

21 MR. KRAMER: That's right, Your Honor.
22 That's right. Well, execution --

23 THE COURT: No, that can't --

24 MR. KRAMER: -- on what?

25 THE COURT: That can't be right --

1 MR. KRAMER: It's not --

2 THE COURT: -- because there is a lot of
3 law out there that says no.

4 MR. KRAMER: It's over -- it's an
5 oversimplification on my part to answer that --

6 THE COURT: Oversimplification. But my
7 question -- but as you articulated the issue, it
8 occurred to me that we might be dealing with that.

9 MR. KRAMER: Well, and it begs the question
10 execution on what? So --

11 THE COURT: There would have to be a
12 judgment.

13 MR. KRAMER: Right. So what's the judgment
14 in this case? What happened is -- remember I said
15 Jamex wanted to buy BTS so it would be in a position
16 to negotiate with Eddystone? That's exactly what
17 Jamex did after it acquired the company, went to sit
18 down with Eddystone and negotiate. That was not met
19 with a warm reception. To the contrary, Eddystone
20 immediately initiated an arbitration against Jamex
21 before the Society of Maritime Arbitrators, and that
22 proceeding ended abruptly before Jamex was able to
23 put on its defense with the settlement. And the
24 settlement was Jamex stipulated to an arbitration
25 award in the amount of the unpaid deficiency payments

1 under the contract, the take-or-pay aspect remaining
2 on the contract, which is about \$140 million, and
3 that award was entered by the arbitration tribunal.

4 At the same time, however, the settlement
5 agreement tells a different story. In the settlement
6 agreement, Jamex expressly denies liability, JTS
7 expressly --

8 THE COURT: Which is --

9 MR. KRAMER: -- denies liability --

10 THE COURT: In settlement agreements,
11 that's --

12 MR. KRAMER: That's right.

13 THE COURT: -- that's typical.

14 MR. KRAMER: That's right, but not if you
15 have a stipulated judgment for \$140 million in
16 liability. I'm positive that that is atypical. On
17 one hand, we have an agreement saying we've done
18 nothing wrong; on the other hand, they've stipulated
19 to an award for \$140 million. Why did they do that?

20 THE COURT: Well, isn't that an argument
21 that you could make every time there's a settlement
22 and the denial of liability? I don't want to make
23 reference to that aiding bank that just paid a lot of
24 money --

25 MR. KRAMER: Uh-huh.

1 THE COURT: -- to settle claims. I'm not
2 talking about the \$3 billion fine, but --

3 MR. KRAMER: Right.

4 THE COURT: -- they said the same thing.
5 So it's typical.

6 MR. KRAMER: But did they stipulate to a
7 judgment for that settlement amount? Because that's
8 what Jamex did, they stipulated to an arbitration
9 award finding them liable for \$140 million while at
10 the same --

11 THE COURT: Some judges might that -- might
12 find that to be a distinction without a difference.
13 I haven't looked into it.

14 MR. KRAMER: Okay.

15 THE COURT: But that doesn't -- that
16 argument doesn't impress me because it -- in real
17 life, in settlements, when companies decide to pay
18 millions and millions of dollars at settlement and
19 deny liability, you can make the same argument, the
20 payout is the same. They have to satisfy the
21 judgment --

22 MR. KRAMER: That's right. We --

23 THE COURT: -- and they have to pay the
24 money.

25 MR. KRAMER: We -- yes, but let's follow it

1 through. What happened --

2 THE COURT: But what about the release?
3 Was there a release?

4 MR. KRAMER: There -- yes, there was a
5 release of claims and a covenant not to sue I believe
6 the principals of Jamex, the people who bought JTS.
7 Some money was exchanged, some oil was exchanged that
8 was sitting in the Eddystone facility, and --

9 THE COURT: Did BTS secure a release in its
10 favor?

11 MR. KRAMER: No, BTS stipulated to a
12 judgment against it for \$140 million.

13 SPEAKER: JTS.

14 MR. KRAMER: Excuse me. Yes, the name had
15 been changed at that point to Jamex Transfer
16 Services, but JTS, BT -- formerly BTS, stipulated to
17 a finding of liability for \$140 million while at the
18 same time entering into a settlement agreement
19 disclaiming liability, which is where I see the
20 disconnect. And when Eddystone took this award to
21 Judge Pauley in the Southern District of New York to
22 have it confirmed, we moved to intervene. And while
23 the motion to intervene was denied, what the judge
24 said was I find this troubling and I'm going to put
25 it on hold, I'm not going to confirm the award.

1 THE COURT: What did Judge Pauley do? He
2 happens to be one of the judges in the SDNY who I
3 know fairly well.

4 MR. KRAMER: He --

5 THE COURT: What did he do?

6 MR. KRAMER: He stayed the motion to
7 confirm until this case is resolved.

8 THE COURT: Until --

9 MR. KRAMER: Yes.

10 THE COURT: He's waiting for me?

11 MR. KRAMER: That's right. That's right.
12 And this case -- of course -- it's a tangled web we
13 weave, Your Honor, and this tang -- this case arises
14 from an effort to enforce the stipulated arbitration
15 award which hasn't been confirmed.

16 THE COURT: But back to the release.
17 Companies that pay money typically get a release in
18 return for payment of money, or the entry of
19 judgment.

20 MR. KRAMER: Uh-huh.

21 THE COURT: And what I'm getting at, was
22 there a general release?

23 MR. KRAMER: Not in favor of JTS. There
24 was a release in favor of the people who owned the
25 company and purchased it from Bridger and Ferrellgas,

1 but JTS was not released. To the contrary, it
2 stipulated that it was liable for the full amount
3 sought by Eddystone.

4 THE COURT: Release of all -- I'm talking
5 about not a release -- well, I guess I'm talking
6 about a release of that claim, the claims that were
7 asserted in that arb -- that arbitration. And have
8 you looked at the documents that were associated with
9 that?

10 MR. KRAMER: I have, Your Honor. I
11 believe we've submitted them, and we could do it
12 again, but --

13 THE COURT: Oh, do you --

14 MR. KRAMER: I don't know if they're in
15 your binder. I guess they're not.

16 THE COURT: My binder. The Court would
17 tilt if we piled all of the documents --

18 MR. KRAMER: No doubt.

19 THE COURT: -- on --

20 MR. KRAMER: No doubt.

21 THE COURT: -- in the binder, right? I'm
22 reminded of a huge patent case which I did. It's the
23 last time I did it. I ordered paper copies of
24 exhibits. My courtroom looked like a warehouse. It
25 was -- it was just awful. I don't have a desire to

1 look, but it occurs -- occurred to me that -- and you
2 folks have spent much more time than I -- that's a --
3 that's a gross understatement -- in analyzing these
4 issues, but it was one of the things that occurred to
5 me and I had no answer, and you've given me your
6 answer.

7 MR. KRAMER: That's right, Your Honor, if
8 you put the --

9 THE COURT: And you don't think there's any
10 solace on any side that could be found in these
11 documents that were executed in connection with the
12 settlement to which you've just referred?

13 MR. KRAMER: No, I don't, Your Honor,
14 because the settlement was very intentionally
15 constructed to allow this lawsuit to proceed next,
16 which is why we find ourselves here after that
17 proceeding was resolved.

18 THE COURT: How was that done?

19 MR. KRAMER: What?

20 THE COURT: How was that done?

21 MR. KRAMER: Well, you -- I believe you had
22 the same lawyers involved, and the way it was done is
23 that all of the parties -- the arbitration -- we were
24 not a party to the arbitration. The plaintiff in the
25 arbitration was Eddystone; the defendants in the

1 arbitration included JTS and its parent and the
2 principal who owned the family of companies, James
3 Ballengee. When a settlement agreement was reached
4 the deal was Ballengee and his companies would pay a
5 certain amount of money, I believe it was a few
6 hundred thousand dollars, they would turn over title
7 to some oil that was sitting in the Eddystone
8 facility, and they would stipulate to a \$140 million
9 judgment against JTS, against the subsidiary, and in
10 exchange, they would all be released except for JTS,
11 allowing the other side to use that arbitration --
12 that stipulated arbitration award as a springboard to
13 sue Ferrellgas, Bridger, Mr. Rios, Mr. Gamboa under
14 alter ego and fraudulent transfer theories, the
15 collection action.

16 So the -- circling all the way back around,
17 is this -- is this discovery in aid of execution?
18 No, it's an effort to collect on a debt that was
19 established through this stipulated arbitration
20 award, using that very intentionally to bring us into
21 this proceeding, and it's --

22 THE COURT: Isn't that a stipulation in aid
23 of execution, an arbitration award reduced to
24 judgment?

25 MR. KRAMER: It hasn't been confirmed and

1 reduced to judgment.

2 THE COURT: Oh, because Judge Pauley is
3 holding his case in abeyance until I rule.

4 MR. KRAMER: That's right. He's -- I
5 believe the case is stayed until there's been a
6 finding on the alter ego allegations in this case
7 that will allow Judge Pauley to determine whether
8 he's able to confirm the award, although I don't
9 purport to know what's going on in his head.

10 THE COURT: All right.

11 MR. KRAMER: But we've gone far afield, so
12 if I may -- I don't want to take too much of the
13 Court's time -- bring it back to the crime fraud
14 dispute and how we can move forward in an orderly
15 fashion?

16 THE COURT: I'm going to order that you
17 meet and confer to continue this discussion and come
18 up with something that works that isn't front-loaded
19 with lots of ex parte reviews --

20 MR. KRAMER: Okay.

21 THE COURT: -- because if we get into too
22 much of that, I'm thinking -- well, it just depends
23 on volume.

24 MR. KRAMER: Uh-huh.

25 THE COURT: And I don't do this very often,

1 but we might need a discovery master.

2 MR. KRAMER: That's right, and that's
3 something that's been suggested. You know, if you go
4 back and you read the motion to enforce the crime
5 fraud order that was filed by the other side that
6 we're talking about right now, what it asks for is
7 two things: an in-camera review of the 117 documents
8 from the sample that Judge Kelly reviewed that were
9 not produced, as well as an in-camera review of
10 around 700 documents from a list that the other side
11 created that also were not produced. So we're
12 talking about less than 1,000 documents.

13 THE COURT: But how many pages, on average,
14 are these documents? I've conducted ex parte reviews
15 where one document is 150 pages.

16 MR. KRAMER: Uh-huh.

17 THE COURT: And you're smiling. Is there a
18 little of that lurking in the background here?

19 MR. KRAMER: I'm smiling because that's the
20 very question Judge Kelly asked before he transferred
21 the case.

22 THE COURT: To me?

23 MR. KRAMER: I don't -- I don't have the
24 precise number in front of me, but I believe it is in
25 the roughly 10,000 to 15,000 page range. So the

1 documents I guess, on average, are four to five pages
2 long. But here we are. That's a good place to
3 start, Your Honor. These are the documents from the
4 in-camera sample. And remember, Judge Kelly said in
5 his order that he found a majority, the vast
6 majority, of the documents he reviewed to be
7 responsive and to fall within the four categories,
8 not all of them. And he said it again in his
9 submission to the Third Circuit.

10 THE COURT: But his sample was much more
11 broad.

12 MR. KRAMER: His sample was only 840
13 documents.

14 THE COURT: Well, more broad in description
15 of what was to be included in the sample. I think
16 there were 40 subject matters.

17 MR. KRAMER: That's right. There were --
18 he identified subject lines, and we gathered all of
19 the emails that had the subject lines --

20 THE COURT: Subject lines.

21 MR. KRAMER: -- submitted them, and it
22 totaled 141 documents -- or 841 documents.

23 THE COURT: And of that number, he directed
24 production of 720-something?

25 MR. KRAMER: No.

1 THE COURT: You came up with that?

2 MR. KRAMER: That's what we produced --

3 THE COURT: Yes.

4 MR. KRAMER: -- after we -- see, that's the
5 problem, Your Honor. We have categories. We don't
6 have an order -- when this motion was styled, the
7 request was order these four categories of documents
8 subject to the crime fraud exception. There was no
9 list of documents until after we finished in the
10 Third Circuit. And Judge Kelly did this in-camera
11 review and he adopted the four categories, but at no
12 time has anyone specified what documents fall into
13 those categories. So the only thing we can do is
14 what we all do as attorneys when we're trying to
15 comply with a court order whether -- or when we're in
16 discovery. And what we did was we took the
17 categories, we went through the documents very
18 carefully with a bias towards disclosure, and we
19 looked for any that fell in those categories, and we
20 produced them. We're not trusted by the other side
21 to make those determinations. That's a problem of
22 their own making, but here we are.

23 THE COURT: Well, that can be said in any
24 case. Frequent --

25 MR. KRAMER: sure.

1 THE COURT: Frequently, it is. But,
2 fortunately, must more frequently, it is not. And
3 judges don't oversee this discovery by the ex parte
4 review process --

5 MR. KRAMER: That's right.

6 THE COURT: -- very frequently.

7 MR. KRAMER: I understand, Your Honor.

8 THE COURT: And I want to try -- I want to
9 try to avoid it.

10 MR. KRAMER: The only except -- the only
11 pushback I have on that concept -- and I don't
12 disagree at all, but it is very common in the crime
13 fraud context.

14 THE COURT: Exactly, and we recognize that.

15 MR. KRAMER: It just sort of wasn't done
16 all the way here, and as a result, we have
17 disagreements. The parties are at loggerheads and we
18 need someone to arbitrate those disagreements. And,
19 again, we've offered repeatedly to submit these for
20 in-camera review, but what we can't do -- because,
21 you know, not only are we representing our clients
22 here, but this is the attorney-client privilege.
23 It's not to be taken lightly. We can't just fork
24 over the documents and waive it all. I mean there --
25 these are not documents that fall within the four

1 categories.

2 THE COURT: As I'm sitting here hearing
3 you, I'm having a devilish thought, appointing Judge
4 Kelly discovery master in this case.

5 MR. KRAMER: I may have prompted that
6 devilish thought --

7 THE COURT: He will --

8 MR. KRAMER: -- with my prior comment.

9 THE COURT: I'll tell him you did. But he
10 will -- he will not love me for that. And he'll
11 undoubtedly say no. And I'm being -- that was said
12 completely in jest. It's -- we've been at it for
13 quite a while, although I find this well,
14 presentation, both sides -- and I'm not through.
15 I'll certainly give other -- the other parties a
16 chance to speak. But I'm finding it very helpful and
17 a little entertaining. And the latter thought I
18 never thought I'd say, I'd utter in this case. You
19 may continue, sir.

20 MR. KRAMER: Glad to be helpful and
21 entertaining, Your Honor. And I'll wrap it up
22 because I can take a hint. The path forward here I
23 think everyone agrees is to find the third party
24 neutral, whether it's a magistrate or a master, to
25 take a look at some subset of these documents. What

1 I hear the Court say is we should confer about that
2 subset. We can do that. My suggestion is the place
3 to start here, if we're going to start, is exactly
4 what plaintiffs requested in their motion, which is
5 they look at the documents from the in-camera sample
6 that Judge Kelly reviewed but that we did not
7 produce, about 117 documents, and then look at the
8 documents on their list that we did not produce,
9 which is the 782 documents I referenced earlier.

10 If there are -- if there are to be keyword
11 searches -- again, first time hearing this today and
12 we'll confirm more -- that results in an in-camera
13 review, I think we can make some progress there with
14 the other side, but the letter we received just said
15 hey, these documents almost certainly fall within the
16 order; produce them right away. There was no -- I'm
17 glad we're moving towards a compromise position.

18 THE COURT: Well, we are, but as you
19 articulate your position, it seems to me you've got
20 nothing to lose by overproducing, based on what
21 you've told me.

22 MR. KRAMER: That's right, Your Honor, and
23 I think we did overproduce when we selected the
24 documents that fell within the four categories.

25 THE COURT: Well, that's a typical

1 response, but I'm talking about from this point
2 forward. And -- but I can't order that.

3 MR. KRAMER: That's --

4 THE COURT: I can tell you that I'm
5 concerned that -- I don't know whether you told me
6 that all of the assets were liened, but if they were,
7 are we tilting at windmills? I don't --

8 MR. KRAMER: Yes, we absolutely are, Your
9 Honor.

10 THE COURT: That's a typical answer from a
11 defense lawyer whose company -- whose company is
12 charged with owing some money.

13 MR. KRAMER: Well, look, I don't mean to
14 minimize the complexity of the issue because it's
15 not, you know -- it's not as simple as we've
16 discussed today, but it's a big issue in the case and
17 it's one that hasn't drawn a lot of attention and
18 it's one that deserves attention. Unless the Court
19 has further questions, I will --

20 THE COURT: No. No, I do not.

21 MR. KRAMER: -- go back to my seat and let
22 Mr. Scarborough speak about the schedule.

23 THE COURT: Right. We're going to let --

24 MR. AGUSTI: Your Honor, before Mr.
25 Scarborough speaks -- and I don't want to interrupt.

1 I just wanted to respond just very briefly to Mr.
2 Kramer's remarks.

3 THE COURT: Well, Mr. Scarborough, I don't
4 need to hear about the schedule right now. What I
5 need to hear about is anyone else's view on what
6 we've discussed so far.

7 MR. SCARBOROUGH: Because Mr. Agusti had
8 addressed you on the schedule, I was going to come in
9 from behind. I'm happy to wait until it's time.

10 THE COURT: Oh, abs -- certainly before I
11 adopt a schedule, I'm going to hear from all sides.

12 MR. KELLEY: If I could just be briefly
13 heard on behalf of my clients, Your Honor, Mr. Rios
14 and Mr. Gamboa?

15 THE COURT: Yes.

16 MR. KELLEY: So, obviously, on this crime
17 fraud issue, we're not directly involved in the sense
18 that they aren't our privileged documents, we don't
19 hold the privilege, and we defer to them on that
20 issue. The only thing that I would say because
21 there's been a discussion of the merits -- and I
22 think it's important for you, Your Honor, at the
23 beginning of this to kind of appreciate and
24 understand the distinction that my clients operate.
25 My clients were two executives not at the BTS level,

1 but at a level above the BTS level of the company.
2 They weren't officers and directors of that. And
3 they were involved as executives in this transaction,
4 not in an authoritative way because they didn't have
5 the authority to do that. It was a member-managed
6 LLC and they were acting at the direction and
7 instruction of their bosses, the CFO of the company,
8 the CEO of the company, et cetera, and somehow we
9 got -- my clients got swept up into all of this.

10 The one point that I would make, Your
11 Honor, broadly, that I think in terms of like the
12 best way to look at this case -- and you've really
13 kind of -- when you asked Mr. Kramer the question --
14 I understand you're simplifying things a little
15 bit about this being a collection action, but that's
16 really what this is. And what's fascinating, and you
17 hear Mr. Agusti talk about how this contract became
18 uneconomical for BTS.

19 The reality is, Your Honor is that BTS was
20 a midstream energy company. They just -- they move
21 the oil from one place to another. And in that
22 sense, they're in exactly the same position that
23 Eddystone was in. Eddystone is just -- they own a
24 facility that moves oil from trains to barges. And
25 companies that are in the business of moving the oil,

1 they don't buy it, they're not exposed directly to
2 market risk. So when the spread collapses, Your
3 Honor, or when it becomes uneconomic to move, they
4 have these long-term contracts that they rely upon,
5 and BTS was no different. BTS had a long-term take-
6 or-pay contract with Jamex, a third party, in which
7 Jamex promised that no matter what happened, whether
8 the contract was economical or not, Jamex was going
9 to keep on paying every single month. That's the
10 same kind of contract that BTS had with Eddystone
11 that's at issue in this case.

12 Here's what -- here's why this is
13 significant, Your Honor, is what this means is that
14 when you contract with a counterparty and you're a
15 midstream energy company, you recognize that you have
16 indirect exposure to their customers' credit risk.
17 And so whenever these contracts are negotiated, one
18 of the most important aspects of the contract are the
19 financial assurances that you're going to be provided
20 beyond the entity itself. So what happens if that
21 entity no longer -- if its customers default and its
22 customers can't pay, which is what happened here?
23 What's going to happen?

24 So those are hotly negotiated. And you can
25 do everything from a parent guarantee that says we'll

1 guarantee everything, and so you can go right to the
2 top, or you can just -- you can have limited
3 financial assurances that are just given by the
4 special purpose entity itself. Here, Your Honor,
5 when this contract was negotiated, Eddystone did a
6 terrible job of negotiating financial assurances.
7 They didn't get a parent guarantee. In fact, the
8 guarantees they got were very limited and small, and
9 the teeth they had to enforce them were also de
10 minimis.

11 What this case is really about is an effort
12 by Eddystone, who failed to negotiate good financial
13 assurances up front and obtain a parent guarantee, to
14 get one through the back door by way of a fraudulent
15 transfer claim. And it's -- what's striking, Your
16 Honor, is there's an email from their own joint
17 venture partner that says that, who's diagnosing what
18 happened here and says the reason this happened to
19 Eddystone is because Eddystone failed to negotiate
20 financial assurances from the counterparty at the
21 beginning. So I think that's an important point to
22 make.

23 THE COURT: They're after the money and
24 they claim the money was conveyed fraudulently.

25 MR. KELLEY: Precisely, if they're right

1 about that. And that leads me to my second point,
2 Your Honor. And you're exactly right, it doesn't
3 give a party the right to transfer away assets, which
4 didn't happen here. But what it does mean is that
5 when you contract with an entity and you know that
6 you don't have a parent guarantee, you understand
7 that that exposes you to risk associated with that
8 entity.

9 Let me deal with the issue of the liens
10 because it's everything that Mr. Kramer has talked
11 about, but with respect to my client, it's even worse
12 than that. The idea here, Your Honor, is there's a
13 thought experiment that you could do and say if
14 instead of transferring these assets that were liened
15 up, let's just say BTS didn't sell and they just said
16 we're going to default and we're going to go into
17 bankruptcy. The point is Eddystone would have been
18 in no worse position in that circumstance than they
19 are in the circumstance where the company was sold
20 and the assets were transferred, because if BTS just
21 said I'm not going to pay, and the creditors showed
22 up -- Eddystone showed up in bankruptcy and they said
23 we need to execute on this \$140 million judgment that
24 we've got against BTS, then the bankruptcy judge is
25 going to say you got a problem, you've got Bank of

1 America with a priority lien in front of you.

2 That's all that happened. But it's even
3 worse, Your Honor, for my client because unlike BTS,
4 my client is not a transferee. We didn't receive any
5 of these assets, and to this day, Your Honor, when we
6 talk about weird kind of things that haven't been
7 focused on, none of these assets that they're
8 complaining about ended up in my client's bank
9 account, on my client's balance sheet. They're just
10 guys that are in mid-level, executive positions in
11 this big, sprawling Ferrellgas entity.

12 THE COURT: Didn't Judge Kelly rule on
13 this?

14 MR. KELLEY: He has not ruled on this
15 issue.

16 THE COURT: Well, no, he ruled. There was
17 a motion to dismiss filed on behalf of your client.

18 MR. KELLEY: There was -- on grounds that
19 had to do with whether there were fiduciary duties
20 that apply. Whether -- it basically turned on
21 whether Delaware law applies or -- excuse me, whether
22 Pennsylvania law or Louisiana law applied. And it
23 was a pleading -- it was a pleading on the -- or a
24 motion on the pleadings, a motion to dismiss. This
25 is a summary judgment point that will get briefed to

1 the Court at some point. But the problem, from my
2 client's perspective with the whole fraudulent
3 transfer claim --

4 THE COURT: Well, I don't know what he -- I
5 haven't read the complaint in detail.

6 MR. KELLEY: Yes, Your Honor.

7 THE COURT: I do know that Judge Kelly
8 ruled --

9 MR. KELLEY: He did.

10 THE COURT: -- and I don't remember whether
11 it was a 12(b)(1) or 12(b) -- 12(b)(1)?

12 MR. KELLEY: (6).

13 THE COURT: (6).

14 MR. KELLEY: Yeah.

15 THE COURT: 12(b) --

16 MR. KELLEY: There was a 12(b)(6) filed at
17 the outset of the case where we pointed out -- we had
18 some jurisdictional issues, personal jurisdiction
19 issues that he overruled and denied that motion. And
20 then we had some claims that had to do with the fact
21 that we -- he -- they have a breach of fiduciary duty
22 claim, and one of our arguments was as a matter of
23 law --

24 THE COURT: So you moved to dismiss part of
25 the complaint?

1 MR. KELLEY: Yeah, we moved to dismiss the
2 breach of fiduciary duty claims. Yes. And he
3 denied -- he denied that on the basis -- on the basis
4 that we moved on in that 12(b)(6) motion. We've
5 subsequently moved on this 12(b)(1) motion where we
6 pointed out that under this recent case decided by
7 one of the sister -- your sister courts here, that a
8 plaintiff has to bring a claim derivatively --

9 THE COURT: But Judge Baylson disagrees.

10 MR. KELLEY: What's that?

11 THE COURT: Judge Baylson disagrees. You
12 said "sister court." You mean one of my fellow
13 judges?

14 MR. KELLEY: Yes, it's the -- Your Honor,
15 which case -- it's the -- it's the case -- it's the
16 recent case that was -- it was a 2019 case. It's the
17 Artesanias Hacienda Real S.A. case.

18 THE COURT: That's on appeal now, isn't it?

19 MR. KELLEY: Yeah, I believe it -- I don't
20 know, actually. I believe it's -- I believe it's on
21 appeal. But it was a situation where --

22 THE COURT: That's what I said.

23 MR. KELLEY: Yeah -- where the court found
24 that a claim for breach of fiduciary duty in a
25 context like this where you're bringing a claim

1 against officers and directors and you're saying I'm
2 claim -- I'm saying you breached your fiduciary duty
3 on behalf of the company, it's a derivative claim.
4 It would be the same if you brought it on behalf of
5 shareholders.

6 THE COURT: Other -- but you said one of my
7 sister judges.

8 MR. KELLEY: In the Eastern District of
9 Pennsylvania.

10 THE COURT: Yes.

11 MR. KELLEY: Yeah.

12 THE COURT: Another judge ruled the other
13 way.

14 MR. KELLEY: Which judge was that?

15 THE COURT: Judge Baylson.

16 MR. KELLEY: In which case, Your Honor?

17 THE COURT: It will take me a second.

18 MR. KELLEY: I know that there is something
19 in their briefing about the -- about the Bruno case,
20 which they claim went the other direction, Your
21 Honor, but of course we -- as we point out in our
22 reply brief, we fundamentally disagree with their
23 reading of that case, the -- I don't know if you're
24 talking --

25 THE COURT: Baylson's --

1 MR. KELLEY: -- about the In re Bruno case.

2 THE COURT: Baylson's opinion was Impala,
3 but we're not -- we don't have to go there.

4 MR. KELLEY: Yeah, in any case -- yes, Your
5 Honor. And I don't mean to get off on that rabbit
6 trail. My point was --

7 THE COURT: Because you're -- you pointed
8 to a case that, at least in this district, there is
9 conflicting law.

10 MR. KELLEY: The most recent opinion from a
11 court in this district is the Artesanias case from
12 last year, 2019, and that's where they these --

13 THE COURT: Nick, who decided that case?
14 Do we know?

15 MR. KELLEY: Yeah, 2019. It was decided
16 August of 2019.

17 THE COURT: Yes, that was decided by Judge
18 Smith --

19 MR. KELLEY: Okay.

20 THE COURT: -- in Eastern --

21 MR. KELLEY: That makes sense. That sounds
22 right. But just so you can appreciate again how my
23 client is situated differently, the -- in addition to
24 having this lien standing in front of them, the other
25 problem they have, with respect to my client, is we

1 didn't benefit from this. We didn't get -- the
2 assets weren't transferred to us, they didn't end up
3 in our bank account, they didn't end up on our
4 balance sheet. The best that they have been able to
5 say is that well, you owned shares, you were one of
6 thousands of unit holders in publicly-traded
7 Ferrellgas. And so some theory is that you
8 benefitted in some way there even though -- the
9 problem is the stock price fell precipitously
10 following this.

11 So I bring all that up so the Court has an
12 appreciation I think of how we're situated
13 differently. We share many of the same defenses with
14 the Ferrellgas lawyers in terms of the merits of the
15 case, and we share their opinions on the crime fraud
16 issues to the extent it matters though, it's not our
17 privilege. But we have a number of additional
18 defenses that are unique to our clients because they
19 were individuals who were not involved in these
20 decisions -- well, were involved in them, but only in
21 the extent that they were acting at the instruction
22 and direction of their -- of their -- people that
23 they worked for, their bosses, and didn't benefit.

24 THE COURT: Aren't you getting into a
25 summary judgment argument now?

1 MR. KELLEY: No --

2 THE COURT: I don't --

3 MR. KELLEY: You will. You will, Your
4 Honor.

5 THE COURT: I don't --

6 MR. KELLEY: And I just wanted to point --

7 THE COURT: Oh, I thought that's what I was
8 hearing now.

9 MR. KELLEY: I just wanted to point that
10 out to Your Honor so you had an appreciation for the
11 kind of ground rule -- the context and background.

12 THE COURT: What I'm struggling with now is
13 getting this case on track.

14 MR. KELLEY: Yes, Your Honor.

15 THE COURT: And what you want -- what you
16 want to happen is to get it on track --

17 MR. KELLEY: Yes.

18 THE COURT: -- absent your clients.

19 MR. KELLEY: We would love --

20 THE COURT: I think that's -- well, I know
21 you would love that and that's why you presented it
22 to me.

23 MR. KELLEY: We would love to have
24 discovery completed quickly so we can file this
25 motion for summary judgment and my client can go back

1 to their normal lives, Your Honor. That's our
2 position.

3 THE COURT: Well, that certainly is a goal
4 to be desired for everyone --

5 MR. KELLEY: Yes, Your Honor.

6 THE COURT: -- including all of the
7 lawyers.

8 MR. KELLEY: Yes, Your Honor. Thank you,
9 Your Honor. That's all I ask. That's all I have.

10 MR. AGUSTI: Your Honor, I just wanted to
11 respond briefly, primarily to what Mr. Kramer said --

12 THE COURT: Well, before you do, I want you
13 to move -- we're going to set a schedule for the meet
14 and confer and getting back to me, and --

15 MR. AGUSTI: Yes, sir.

16 THE COURT: -- I want you to move on that
17 quickly. It sounds like we have the seeds -- and
18 I'll use that term -- of an agreement, and that's,
19 well, a substantial accomplishment.

20 MR. AGUSTI: Your Honor, absolutely. Just
21 to be clear -- and the reason I'm doing this is to be
22 clear -- our letter actually -- not only does our
23 letter suggest that if the documents are voluminous,
24 that we consider a special master to handle the
25 issue, but we also were quite specific that we never

1 suggested that the documents that came up on the
2 keywords should be turned over to us willy nilly.

3 THE COURT: All right. Well --

4 MR. AGUSTI: We suggested that it be turned
5 over to a magistrate or special master.

6 THE COURT: Okay.

7 MR. AGUSTI: If there's any thought that we
8 disagree on that, then I wanted to make sure that
9 that's laid to rest.

10 On the lien issue, Your Honor, I just want
11 to be clear that there's something that hasn't been
12 mentioned here, which is that the bank filed its lien
13 the day after these gentlemen had entered into an
14 agreement to distribute all of the assets of BTS to
15 other entities. There's well-established law in this
16 circuit that an upstream guarantee, which is what
17 this would be -- it would have been a lien securing
18 an upstream guarantee -- is only good if the entity
19 that's giving the guarantee is -- benefits or
20 receives a benefit from that -- from that guarantee.

21 By definition, if an -- if an entity is
22 torn completely apart after the lien is filed -- or
23 before the lien is filed, that guarantee is
24 fraudulent transfer itself, the lien is a fraudulent
25 transfer. In fact -- and I wanted to be very clear

1 that while we are -- want more documents because,
2 Your Honor, we're entitled to more documents, those
3 4,500 documents include very good documents,
4 including --

5 THE COURT: The numbers keep changing.
6 I've got a lot of numbers on my yellow pad.

7 MR. AGUSTI: Yes, Your Honor.

8 THE COURT: I thought we were -- we were
9 down to 25,000, at least someone said. That's right,
10 it was you, 25,000 documents.

11 MR. AGUSTI: No. Yeah, let me tell you
12 about the --

13 THE COURT: You're going to -- you're going
14 to narrow that list.

15 MR. AGUSTI: We're going to narrow it.
16 Your Honor, there are 65,000 entries in their log, so
17 that's actually 65,000 documents. I said 100,000.
18 Those are the number of pages that we understand are
19 involved. So it's about 65,000 documents. I would
20 stand corrected if that's wrong, but it's 100,000
21 pages. And hope would be that -- and I think that
22 it's a good hope -- that through cooperation with
23 counsel perhaps, we could get it to a narrower group
24 of documents that if Your Honor is not excited about
25 going through all of them, perhaps we can have the

1 magistrate or a special master review the documents.

2 So I do think we do have largely an
3 agreement here, but we may need some assistance, Your
4 Honor, in determining, for example, the keywords. We
5 hope we can do this all agreeably, but if not, then
6 we would probably want to try to get back to you on
7 that.

8 Finally, Your Honor, I would say since
9 there was an argument on the motion made here on the
10 Artesanias Hacienda case, Your Honor, that case was
11 nothing like what Mr. Fielding said. That case is a
12 bankruptcy case, and it says that in a bankruptcy
13 case, a bankruptcy trustee brings a fiduciary duty
14 claim on behalf of the estate, as is usually the case
15 for a bankruptcy estate creditor. So I think --

16 THE COURT: It's a derivative suit --

17 MR. AGUSTI: It -- well --

18 THE COURT: -- under your -- under
19 Artesanias.

20 MR. AGUSTI: In Artesanias, it doesn't talk
21 about a derivative suit. It's actually talking about
22 the --

23 THE COURT: And there's another reason why
24 Artesanias is not squarely on point.

25 MR. AGUSTI: Yes, Your Honor.

1 THE COURT: It addresses an issue that,
2 quite frankly, I haven't had any contact with before,
3 but it's called deepening insolvency. I'm certain
4 everyone in the room knows what that means. I didn't
5 when I first -- when I first read it. It's a unique
6 scenario. And deepening insolvency claims are
7 handled differently than --

8 MR. AGUSTI: Yes, Your Honor.

9 THE COURT: -- routine claims.

10 MR. AGUSTI: So, Your Honor, I -- that's
11 all -- that's all I had to say.

12 THE COURT: Well, what we're going to do on
13 this issue, before I hear from Mr. Scarborough and
14 whoever will speak for the plaintiffs on the
15 schedule, we're going to come up with a framework.
16 We're not going to go into scheduling right at this
17 minute. We're going to come up with a framework for
18 the way in which the discovery issue should be
19 presented. I'm going to order a meet and confer, and
20 I think it might be better -- and I draft almost all
21 of my orders, but I think it might be better if you
22 meet and confer and send me an agreed upon. That's
23 really a directive. I don't want any horsing around.
24 I want an agreement on a form of order and a
25 procedure to be followed that makes sense in the

1 context of this case. And I think with what we've
2 accomplished today -- and we really accomplished a
3 lot more. I haven't ruled on much of anything, but I
4 think we've set the stage for moving the case
5 forward. You know how I'm going to handle the case.
6 You've gotten some idea of that today.

7 What we'll do, we're not going to convene
8 everybody. I know your law firms, but what I don't
9 know is how close to Philadelphia you are. I suspect
10 not many of you are local, local. Is that a correct
11 statement?

12 MR. SCARBOROUGH: That's fair, but we're
13 not far away.

14 MR. AGUSTI: Your Honor, I'm just in
15 Washington, D.C., close as the Acela.

16 THE COURT: Okay, thank you.

17 MR. KELLEY: We can get here when you need
18 us to, Your Honor.

19 THE COURT: Well, then when I deal with
20 everyone else by telephone, you can train up if you
21 would like. No, we'll deal by telephone. And what
22 I'll do is identify the agenda in advance and give
23 you an opportunity to add to the agenda and then
24 schedule -- and maybe we'll do it today, as a matter
25 of fact, but we'll schedule with liaison counsel, and

1 liaison counsel can bring anyone else into the --
2 into the telephone conference, and we'll record the
3 telephone conferences. It's the way I handle MDLs
4 and it works. I think I was one of the first judges
5 to start doing that in the early 2000s, late 1990s,
6 and it has caught on because most of my colleagues
7 all over the country are doing it now instead of
8 dragging everybody here. My mentor, as an MDL judge,
9 had a contrary view. He wanted everyone in the
10 courtroom and would do that monthly, and I don't
11 think that works.

12 The first thing we're going to schedule is
13 the submission of a joint report, meet and confer, to
14 address all discovery issues and submit a proposed
15 order, including identification -- I don't know
16 whether I'm going here. I might go with a magistrate
17 judge -- identification of a special master for
18 discovery on which you agree. I'm going to leave to
19 you the way in which the payment should be handled,
20 but certainly the parties will pay for the special
21 master if we go that route. The alternative would be
22 using a magistrate judge.

23 All right. How much time do you need to do
24 that?

25 MR. AGUSTI: Your Honor, ten days would be

1 fine for us.

2 MR. SCARBOROUGH: Likewise.

3 THE COURT: Really? Is that enough time?

4 MR. SCARBOROUGH: Well, we --

5 THE COURT: I don't --

6 MR. SCARBOROUGH: -- were whispering two
7 weeks, but Mr. Agusti said ten days. As you'll hear
8 from me in a minute, we're not looking to delay this
9 unwarrantedly, so if Me. Agusti thinks we can have a
10 proposal and a response in ten days, we'll work very
11 hard to meet it.

12 THE COURT: Okay. Does that -- what is
13 that, next Friday (indiscernible)? Not here.
14 Someone with a calendar? I guess I have to get my
15 own calendar.

16 (Pause in proceedings.)

17 MR. SCARBOROUGH: 6th. March 6th, Your
18 Honor.

19 THE COURT: Okay. Is that -- that's --
20 it's a Friday. Okay. March 6th. If more time is
21 needed, then simply drop me an email and you'll have
22 it. I think we're really moving in the right
23 direction on resolving the discovery disputes. And
24 maybe there aren't as many discovery disputes as
25 there were at the beginning of this conference. It

1 seems to me some of the issues have been addressed,
2 and I think you might have a different perspective on
3 them. I'm still a little concerned about the lien
4 Mr. Agusti came up with, an issue -- I'm not a
5 commercial transactions -- well, certainly not a
6 commercial transactions judge. I almost was a
7 commercial transactions lawyer, but I did not go with
8 that law firm.

9 The bottom line, I want you to try to reach
10 agreement that works, something that is feasible.
11 And keep in mind that if you've got nothing to lose
12 from the defense, it's better to disclose subject to
13 whatever protections you need. If the documents say
14 what you say they say, then -- don't rely on
15 principle, with an L-E, to cause me to have to figure
16 out how to -- how to, well, get through this
17 discovery issue.

18 All right. Now, Mr. Scarborough, do you
19 think we ought to go ahead and schedule now and leave
20 it the way it is -- the way the schedule reads now,
21 beginning four weeks after I rule?

22 MR. SCARBOROUGH: Well, we had -- our time
23 periods -- well, first, let me back up. I'm Larry
24 Scarborough. I represent Bridger and Ferrellgas.
25 And because Mr. Agusti and his team have one schedule

1 and ours is longer, I wanted to start by saying if
2 you add all theirs up, I think we're now all
3 coalescing around the notion that the trigger point
4 is the resolution of the scope of the crime fraud
5 production.

6 THE COURT: Well, that's where you start --

7 MR. SCARBOROUGH: That's right.

8 THE COURT: -- but their --

9 MR. SCARBOROUGH: And that's where I wanted
10 to pick up.

11 THE COURT: Plaintiffs are I think at --

12 MR. SCARBOROUGH: They're at --

13 THE COURT: No, you're at -- you're at 30-
14 some odd months and they're at 50.

15 MR. SCARBOROUGH: I did my --

16 THE COURT: Who is going --

17 MR. SCARBOROUGH: I did my homework while
18 the rest of the crew was arguing. So if you follow
19 the schedule from the plaintiffs, it's 35 weeks --

20 THE COURT: For them, and 52 --

21 MR. SCARBOROUGH: -- from the trigger
22 point, 53 weeks --

23 THE COURT: Okay.

24 MR. SCARBOROUGH: -- from us. So to
25 recommunicate the point I just made, we're not

1 looking to overly delay this. My overarching view is
2 that our schedule is more practical from a -- just a
3 stepping through a very large case with a big record.
4 But I came to the podium to talk about one particular
5 date for Your Honor and that's the first one, whether
6 the fact witness depositions can be completed in six
7 weeks or ten. That's the one for which I want to
8 advocate for, ten, and here's the reason why.

9 We're all agreed that there are nine
10 depositions. There are names attached to those
11 depositions. Two of them are 30(b)(6) depositions,
12 one for each side. The parties have relative control
13 over the deponents and the scheduling. That leaves
14 seven. Two of them are the individual defendants,
15 Mr. Rios and Mr. Gamboa, over whom -- for whom Mr.
16 Fielding can speak. That leaves five. Those are
17 four ex-Ferrellgas employees and one Akin Gump
18 partner in connection with obviously the crime fraud
19 proceedings. We know who those people are. The
20 lists were exchanged before. We keep in touch with
21 those individuals, but they have other jobs. They
22 have moved on with their lives and have other
23 commitments. So when it comes to scheduling them,
24 we're not going to be able to say, even if counsel
25 were to agree, date X is the date. The employers of

1 those individuals are going to have something to say
2 about it.

3 So based on the fact that we all know we've
4 taken 11 of the depositions, and looking how long
5 that took --

6 THE COURT: How long was the average
7 deposition?

8 MR. SCARBOROUGH: The average deposition
9 went all day, consistent with the -- consistent with
10 the federal rules, and I think some may have gone
11 longer. I can't recall. Maybe it's because Mr.
12 Ballengee has been deposed several times, so there's
13 a lot of transcript on him.

14 In any event, we just think -- and I know
15 that Your Honor would tell us, and I've heard this
16 before, that the schedules of the three sets of
17 lawyers involved don't matter, but the reality is
18 when we take those sets, plus the ex-employees, our
19 position is, from a practical position, ten weeks
20 seems more doable than six. And that's really all I
21 have to say about the schedule. The other dates are
22 the ones that we contend are more reasonable, but of
23 course that's all up to the Court. And I'll end
24 there unless you have questions.

25 THE COURT: No, I don't, although I think

1 what we'll do when I'm finished hearing from all of
2 you on the schedule, we'll go over the schedule line
3 by line because, for example, fact depositions will
4 last either six weeks or ten weeks or something in
5 between.

6 MR. SCARBOROUGH: The -- and that's what I
7 just --

8 THE COURT: I know.

9 MR. SCARBOROUGH: -- addressed.

10 THE COURT: I understand. The very next
11 item on the list, expert reports, two weeks after
12 completion of fact depositions for plaintiff, four
13 weeks after completion of fact depositions for
14 defendants. That tells me you don't intend to use
15 the -- all of the fact depositions for your expert
16 witness reports.

17 MR. SCARBOROUGH: We do, which is why we
18 advocated for four. We just think getting the
19 transcript together and putting it in and then
20 getting to the reports is not something that can be
21 accomplished in two weeks, but that's just me.

22 THE COURT: Well, that's something I spend
23 a lot of time with as a lawyer. And I get proposals
24 from lawyers where the fact depositions end and the
25 expert witness discovery begins same day. By

1 "begins," I mean the person with the burden of proof
2 submits an expert witness report, same day. That
3 never worked in real life for me. And in real life,
4 when I questioned the lawyers who make that type of
5 suggestion, they say we had never thought of that.
6 That's the answer. But I think about it because it's
7 something I did over and over and over again.

8 MR. SCARBOROUGH: And so --

9 THE COURT: So we're going to go over this
10 list. I gather that you're pretty much in agreement
11 for the defense, although I'll hear from anyone
12 else -- the defense are pretty much in agreement with
13 the plaintiff's proposal except for the completion of
14 fact depositions? You want ten weeks, they want six
15 weeks?

16 MR. SCARBOROUGH: And we think for the very
17 reason Your Honor has stated, that some of these
18 other times need to be elongated to allow for the
19 record to be solidified so it can be used in a
20 meaningful fashion to present to Your Honor --

21 THE COURT: You didn't say this.

22 MR. SCARBOROUGH: -- the arguments in the
23 case.

24 THE COURT: You didn't say that. I was the
25 one who said that.

1 MR. SCARBOROUGH: You did, but that was my
2 point on six versus ten, and I --

3 THE COURT: Oh, for that?

4 MR. SCARBOROUGH: Yeah.

5 THE COURT: But that was just -- this is
6 after resolution of the motion to enforce. And
7 perhaps there's -- well, certainly --

8 MR. SCARBOROUGH: And, Your Honor --

9 THE COURT: -- certainly that would give --
10 that's a time when the experts would have to, well,
11 begin to review the documents that were produced.

12 MR. SCARBOROUGH: And what I said was I was
13 agreeing with Your Honor that we would like to use
14 all the fact witness depositions, which is why we
15 proposed four weeks instead of two as the kickoff
16 time for even expert reports. But Mr. Agusti or
17 whomever on his side can address the reason for two.
18 I'm happy to do this any way -- any way you want.

19 THE COURT: All right. Thank you very
20 much, Mr. Scarborough.

21 MR. SCARBOROUGH: Thank you.

22 THE COURT: Let me hear from the rest of
23 the defendants. They might defer to Mr. Scarborough.

24 MR. KELLEY: We defer entirely to him on
25 this. We share -- we share his concerns and

1 (indiscernible).

2 THE COURT: Mr. Scheff?

3 MR. SCHEFF: Your Honor, this is a non-
4 discovery request. It's a personal request. I have
5 a family matter in New York. I have a child in a car
6 outside this courthouse, and so if I can be excused
7 from the proceeding, I would appreciate that.

8 THE COURT: Absolutely.

9 MR. SCHEFF: Thank you.

10 THE COURT: You may be excused, Mr. --

11 (Pause in proceedings.)

12 MR. AGUSTI: Yes, Your Honor, I'm just
13 going to address the two things that Mr. Scarborough
14 addressed. Certainly, Your Honor, we do have --
15 there are a number of witnesses that are not
16 controlled by the parties, but, basically, we are
17 going to have six weeks to do this, and unless
18 there's a particular preference for one witness
19 coming after another, which we are basically not --
20 we don't think it's necessary to delay depositions to
21 do that, we ought to be able to approach once we know
22 what the -- what the starting date is, we ought to be
23 able to approach these folks and give them a choice
24 of any day within six weeks, and they ought to be
25 able to find a date within six weeks. It's

1 relatively -- there might be an extraordinary
2 circumstance that I can't think of right now, Your
3 Honor. And I'm sure that if something like that
4 happens, we would accommodate it. But, Your Honor, I
5 think that six -- that giving witnesses a choice of
6 any of -- any day within six weeks is perfectly
7 adequate to take care of the schedules of
8 individuals.

9 As for the expert -- the initial expert
10 reports being only two weeks as opposed to four
11 weeks, Your Honor, we would anticipate -- we also do
12 intend to use the -- very much intend to use the fact
13 depositions as part of what's in the expert reports,
14 but we would expect that this would be a process that
15 would be ongoing, even as the fact depositions are
16 going, that we would be in consultation with experts
17 so that they could incorporate the testimony in their
18 reports. And so that the final two weeks, the way we
19 view it -- and, again, we don't want to be
20 unreasonable -- but we view it is that we would --
21 there would be an incorporation and putting --
22 finalizing really the expert reports during that two-
23 week period. So that's what we would say on that.
24 You know, we are over three years now in this case
25 and we are quite anxious to move forward.

1 THE COURT: And that's what we're going to
2 do.

3 MR. AGUSTI: Yeah. And so, Your Honor --

4 THE COURT: Well --

5 MR. AGUSTI: -- that's all I really had to
6 say on those -- on those two points.

7 THE COURT: Fine. Well, we're going to go
8 over the schedule now. Thank you.

9 MR. AGUSTI: Thank you, Your Honor.

10 THE COURT: I think if we're to adopt a
11 schedule now, it has to be framed in the same way as
12 the proposed schedules, defendants' and plaintiff's.
13 In other words, it has to be keyed to the resolution
14 of the motion to enforce. Those documents I think,
15 if there are to be any additional documents produced,
16 must be produced before we go through the rest of the
17 schedule.

18 Maybe I've taken more depositions than you
19 have, Mr. Agusti. I stopped counting, but it was
20 somewhere around 2,500 or 3,000. It was an
21 incredible number. And I always had difficulty
22 scheduling depositions, notwithstanding how
23 reasonable your presentation was. But I think we'll
24 allow ten weeks for the completion of fact
25 depositions.

1 As far as the next item, expert reports, I
2 think we'll compromise and give the defense one less
3 week and the plaintiffs one additional week, three
4 weeks, and the same for the rebuttal reports, the
5 responsive reports, three weeks.

6 (Pause in proceedings.)

7 THE COURT: And three weeks for rebuttal
8 reports as well.

9 You're allowing five weeks to complete
10 expert witness depositions. Is that enough time?
11 Too much time? That's the defense. Plaintiff says
12 three weeks.

13 MR. SCARBOROUGH: Defendants said five
14 weeks, plaintiff said three. Five weeks, to us,
15 makes more sense given the number of experts we're
16 likely to see on both sides.

17 THE COURT: How many experts do you think
18 you're going to see?

19 MR. SCARBOROUGH: Speaking for us, it's a
20 handful, like on the order of five, let's say, maybe
21 plus or minus one.

22 THE COURT: Is that for all the defendants?

23 MR. SCARBOROUGH: Only for the Bridger and
24 Ferrellgas defendants I'm speaking of.

25 MR. KELLEY: We anticipate having maybe

1 two, Your Honor.

2 MR. AGUSTI: Your Honor, we anticipate
3 about five.

4 THE COURT: Five. That's 12. Three weeks
5 to take 12 depositions. You'll have to have
6 deposition tracks. Is that what you want to do?

7 MR. AGUSTI: That's certainly what we
8 anticipated doing, Your Honor, but if Your Honor
9 wants to --

10 THE COURT: I don't know how many tracks --
11 you don't have enough lawyers to require a number of
12 tracks.

13 MR. AGUSTI: Oh, Your Honor, the people in
14 this room are a small subset of the people working on
15 these cases.

16 THE COURT: Just keep in mind that it's all
17 of you and there's one of us and a law clerk, a very
18 able law clerk.

19 MR. AGUSTI: Yes, Your Honor. Your Honor,
20 if Your Honor feels we need more time for --

21 THE COURT: Yes, I do.

22 MR. AGUSTI: -- depositions, of course.

23 THE COURT: Only because my experience
24 tells me if you want to take 12 depositions -- and in
25 this case, 12 experts, we're going to have pretty

1 close to 12 depositions -- you need more time. And
2 I'm not sure the defense time is sufficient, but
3 we'll start there, five weeks.

4 Let's talk about settlement. What I
5 generally do with regard to settlement is I pick a
6 settlement report date, and it doesn't necessarily
7 have to come after all of the work that we've
8 addressed that would go into the schedule before this
9 item on the -- on the schedule. I agree with you
10 that it's a good idea to explore settlement before
11 summary judgment motions have to be prepared and
12 ruled on. And I generally require the parties to
13 meet and confer and come up with an answer to the
14 question whether they believe a settlement
15 conference -- or settlement conferencing -- in this
16 case, it would not be one conference -- before a
17 magistrate judge or some other form of ADR, private
18 mediation, for example, might be of assistance in
19 resolving the case. And if yes, you tell me what the
20 parties agree and when you would be ready to proceed.
21 Does that work better than providing for before --
22 well, certainly I want it before summary judgment.
23 But does that -- it gives you more flexibility.

24 (Pause in proceedings.)

25 MR. SCARBOROUGH: We're happy to have more

1 flexibility. We would be very interested in
2 (indiscernible) --

3 THE COURT: I mean you might decide --
4 well, have you had any settlement discussions?

5 MR. SCARBOROUGH: There have been
6 conversations between Mr. Agusti and myself --

7 MR. AGUSTI: That's right.

8 MR. SCARBOROUGH: -- yes.

9 MR. AGUSTI: That's right, Your Honor, but
10 I -- as Mr. Scarborough says, I think that we would
11 want to have some flexibility as well.

12 THE COURT: Well, then we won't put it off.
13 I haven't counted the number of weeks, but -- well,
14 has anyone counted the number of weeks I've allowed
15 and when it takes us? End of summer?

16 MR. KELLEY: I've got 25, Your Honor,
17 through the completion of expert discovery.

18 THE COURT: So that's six months. That's
19 going to take us to August. Well, my superstar
20 magistrate judge retires June 30th. I'm just putting
21 that out there. If I were to ask you to pick a
22 settlement report date, and it would be a date for
23 writing a very short letter, not docketed, so you
24 don't have to do any redacting, the bottom line, it
25 would read, "Has case settled?" You would tell me

1 case settled or not. If not, you would tell me we
2 agree -- or our clients agree that settlement
3 conferencing before your magistrate judge or private
4 mediation or any other form of ADR -- I chaired the
5 court's ADR Committee until we decided we would fold
6 it into the Civil Rules Committee. But any other
7 form of ADR might work, summary jury trial, things of
8 that sort. I'm open to whatever you might suggest.

9 MR. AGUSTI: Your Honor --

10 THE COURT: Leave that flexible and have
11 you try to pick a date today with the understanding
12 that if you want to initiate this process sooner, you
13 can. If the date we pick today is too soon -- and it
14 might be -- tell me and you'll get a later date. The
15 purpose of this provision is to cause you all to
16 think about settlement at an appropriate time when
17 you think it's appropriate, nudged a little by the
18 Court.

19 MR. AGUSTI: Your Honor, we would love to
20 take advantage of your superstar magistrate, and if
21 June 1 is a date that works, we would be happy to
22 have June 1 be the date.

23 THE COURT: Well, I think maybe you ought
24 to -- and you can powwow now if you -- if you can
25 agree on a date now. Otherwise, I can pick a date at

1 random. And, again, it's very flexible. If the date
2 works, great. If it doesn't, if it's too late, you
3 can advance it. If it's too soon, you can tell me,
4 Judge, we need more time --

5 MR. SCARBOROUGH: So counsel --

6 THE COURT: -- and you'll get it.

7 MR. SCARBOROUGH: Counsel has thrown out
8 June 1st. I'm onboarding your statement, Your Honor,
9 that it might well take -- and I agree with this --
10 more than one session, so I'm won --

11 THE COURT: Oh, I'm sure.

12 MR. SCARBOROUGH: -- I'm sure -- I'm
13 wondering whether June 1 is kind of pushing to be
14 late.

15 THE COURT: It's pushing my magistrate
16 judge, who is not going to appreciate what I'm doing
17 to her now, not going to appreciate that.

18 MR. SCARBOROUGH: So maybe May 1 sounds
19 like a better date, but if you prefer to have us meet
20 and confer, we're very likely to come up with
21 something in there, but I would just push it back 30
22 days.

23 THE COURT: May 1 will give us really about
24 70 days. Hopefully, you'll have more documents by
25 then.

1 MR. AGUSTI: Your Honor --

2 THE COURT: And I don't --

3 MR. AGUSTI: Your Honor, our principal
4 problem, of course, is that we would like to have the
5 documents before we have the settlement conference.

6 THE COURT: You're right. And I said,
7 hopefully, you will have more documents by then. If
8 the date we pick -- first of all, selfishly, I'd like
9 to get for this magistrate judge a going-away
10 present, and this would be a fitting present. He is
11 really very, very good. But May 1st is better than
12 June 1st because I think there will absolutely be a
13 need for more than one conference. But, again, to
14 raise your comfort level, if the date we pick today
15 is too soon, just tell me and you get it. It's
16 automatic. It's your call. And if it's too late,
17 that would please me. You can just advance it. Just
18 write to me and tell me to initiate the process. The
19 process I initiate by issuing an order referring the
20 case to the magistrate judge for settlement
21 conferencing. I generally provide for vacating the
22 schedule, and that would be your call. In other
23 words, while you're embarked in settlement
24 conferencing, I will vacate or will consider vacating
25 the schedule. If the case doesn't settle, you report

1 to me within seven days and submit a proposed
2 schedule for further proceedings at that point.
3 Hopefully, the case would settle. But we'll pick a
4 May 1st or -- let me just check the calendar and make
5 sure that's a weekday.

6 (Pause in proceedings.)

7 THE COURT: It's a Friday. Good. May 1st,
8 settlement report date.

9 (Pause in proceedings.)

10 THE COURT: Do you want to go forward and
11 schedule summary judgment? We're not going to -- I
12 don't think I want to schedule beyond summary
13 judgment today, but do you want to schedule the
14 filing of summary judgment motions? Plaintiffs
15 first.

16 MR. AGUSTI: It makes sense to us.

17 THE COURT: I'm sorry, plaintiffs not
18 first.

19 MR. AGUSTI: It makes sense to us, Your
20 Honor.

21 THE COURT: Plaintiffs not first. It makes
22 sense not to file them. Defense?

23 MR. SCARBOROUGH: Agreed.

24 THE COURT: Defer -- oh, I'm sorry, go
25 forward with it today?

1 MR. SCARBOROUGH: I think I agree with Mr.
2 Agusti, who just said maybe we don't schedule summary
3 judgment --

4 THE COURT: All right.

5 MR. SCARBOROUGH: -- until after we see
6 where we are on settlement.

7 THE COURT: All right. Well, I'll go ahead
8 and do the schedule --

9 MR. AGUSTI: Your Honor, I --

10 THE COURT: -- based on what we've done so
11 far. And you'll remember the key issue that is
12 triggering everything, and that is the discovery --

13 MR. AGUSTI: Yes, Your Honor.

14 THE COURT: -- proposal.

15 MR. AGUSTI: And if I may? I actually --
16 maybe I was misunder -- I stopped in mid-sentence
17 because I didn't want to interrupt Your Honor. I
18 actually thought that it did make sense to have the
19 beginning of summary judgment scheduled because it
20 would provide an incentive for the parties to
21 actually -- well, first of all, we would like very
22 much to have it on the schedule so that we don't have
23 any further delay. And also, frankly, Your Honor, if
24 there's a day of reckoning coming, sometimes it helps
25 settlement discussions somewhat. So we would

1 appreciate I think to have a date on which summary
2 judgment begins.

3 THE COURT: Well, I don't like to schedule
4 things where there might not be a need to go forward.
5 And in a case like this, I would never schedule
6 beyond summary judgment. And here, on the proposed
7 schedule, you asked me to schedule final pretrial
8 filings, and there -- I haven't decided on the form
9 of plan on pretrial order I'll require. I might,
10 notwithstanding the complexity of the case, require
11 nothing more than a short form pretrial memoranda.
12 But after summary judgment, if we go that route, and
13 assuming it's -- well, if it's granted, the case is
14 over. If not, we're talking about marking and
15 exchanging exhibits (indiscernible). Although there
16 might be lots of exhibits in this case, I'll not
17 order paper copies of exhibits. Filing of pretrial
18 memos, and then I generally have a final pretrial
19 conference. And we would have to pick a trial date.

20 How long do you think it will take to try
21 the case, Mr. Agusti?

22 MR. AGUSTI: Your Honor, we were talking
23 about that this morning. We think it will take three
24 to four weeks.

25 THE COURT: Is that the plaintiff's case or

1 the whole case?

2 MR. AGUSTI: The whole case, Your Honor, is
3 what we thought.

4 MR. SCARBOROUGH: I think it's somewhat
5 longer than that from my perspective. A couple of
6 additional weeks is -- based on experience in doing
7 these things, this feels more like a six-week trial
8 even though it is presently set out to the bench.

9 (Pause in proceedings.)

10 THE COURT: I'm focused on the summary
11 judgment.

12 (Pause in proceedings.)

13 THE COURT: Well, the plaintiffs propose
14 that summary judgment motions be filed within two
15 weeks after the end of any mediation or settlement
16 negotiations. And defendants are talking about four
17 weeks. I think we'll wait until we get there. I
18 don't think I'm going to schedule beyond the
19 settlement conferencing. If I change my mind -- and
20 I haven't really thought about this -- I'll either
21 order the summary judgment motions -- and I now
22 appreciate, Mr. Agusti, you were talking about their
23 work, not your work, will be filed -- can you do it
24 in three weeks if I decide to include that in the
25 order, Mr. Scarborough?

1 MR. SCARBOROUGH: We certainly will. And I
2 did misunderstand Mr. Agusti across the aisle, so I
3 apologize for that.

4 THE COURT: Well, no, what he wanted, I
5 thought I misunderstood him as well. But now he
6 wants you to prepare the motions for summary judgment
7 in advance, which is a rather strange request from
8 the plaintiff's side.

9 MR. SCARBOROUGH: And that's why we had
10 four weeks. I mean we were -- again, we were trying
11 to step through a schedule at some pace. At the same
12 time, we're enamored with the -- with the break here
13 at the latest for settlement. So we would like not
14 to have to produce all our summary judgment work to
15 only have two weeks or three weeks afterwards --

16 THE COURT: Well, he would like you to have
17 one week or a few days.

18 MR. SCARBOROUGH: We -- I understand that.
19 We stick with our position that we would prefer four
20 weeks if that's --

21 THE COURT: All right.

22 MR. SCARBOROUGH: -- all right with the
23 Court.

24 THE COURT: Well, I will rule. If I do
25 include that in the order, I'll give the defense four

1 weeks. All right. Is there anything else that we
2 have to do? Nick, have I forgotten anything?

3 (Pause in proceedings.)

4 THE COURT: Anything else, counsel?

5 MR. AGUSTI: Nothing from us, Your Honor.

6 MR. SCARBOROUGH: Nothing from us.

7 MR. KELLEY: Nothing from us, Your Honor.

8 Thank you.

9 THE COURT: So it is or is not discovery in
10 aid of execution? We'll end on that note?

11 MR. KRAMER: I think we can agree that we
12 have oversimplified, but we weren't far off, Your
13 Honor.

14 THE COURT: If you had asked me before this
15 conference whether I would enjoy it, I would have
16 told you heck no. But that turned out not to be the
17 case. I found it challenging, interesting, and
18 hopefully we can keep the case on track now. Thank
19 you all.

20 ALL: Thank you, Your Honor.

21 THE COURT: Have a good day.

22 ALL: You too.

23 (Proceedings adjourned, 4:04 p.m.)

24

25 * * *

CERTIFICATION

I, Michael Keating, do hereby certify that
the foregoing is a true and correct transcript from the
electronic sound recordings of the proceedings in the
above-captioned matter.

2/27/20

Date

A handwritten signature in black ink, reading "Michael T. Keating". The signature is written in a cursive style with a horizontal line underneath it.

Michael Keating